

*United States Court of Appeals
for the
District of Columbia Circuit*



**TRANSCRIPT OF
RECORD**

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. ~~21,317~~ **092**

WESTERN STATES REGIONAL COUNCIL NO. 3, INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO,

and

WESTERN COUNCIL OF LUMBER AND SAWMILL WORKERS, AFL-CIO, *Petitioners*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*,

and

WEYERHAEUSER COMPANY, CROWN ZELLERBACH CORPORATION, RAYONIER INCORPORATED, INTERNATIONAL PAPER COMPANY AND ASSOCIATION, *Intervenors*.

ON PETITION TO REVIEW AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR PETITIONERS

United States Court of Appeals

for the District of Columbia - Circuit

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STATEMENT OF QUESTIONS PRESENTED

As set forth in the Prehearing Conference Stipulation, petitioners believe the following to be the issues presented in this case:

1. Whether the Board properly ruled that in the absence of a multi-employer bargaining unit, the principle of *American Ship Building* validates a concerted lockout in response to a strike against individual employers bargaining in an association format.
2. Whether the Board properly found that the unions and employers created a multi-employer unit and that the intervenors' shutdown of their plants in response to the unions' strike of two employers in the multi-employer unit was lawful action under the *Buffalo Linen* case.

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ON PETITION TO REVIEW AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR PETITIONERS

Jurisdictional Statement

This is a petition to review a Decision and Order of the NLRB in a case originating from charges by the petitioning unions, IWA and LSW. Therein, the Board has found four major lumber companies and their Association—intervenors in this Court—not guilty of violating the National Labor Relations Act. This Court's jurisdiction rests upon Section 10(f) of the National Labor Relations Act, 29 U.S.C. § 160(f).

(1)

Statement of the Case

This is a continuation of a lengthy Labor Board proceeding which this Court reviewed at an earlier stage and remanded to the Board in 1966 for further disposition. See 125 App. D.C. 1, 365 F.2d 934. In the Board's original 1965 Decision and Order it dismissed the complaint based on the companies' invocation of a concerted lockout on June 7, 1963 pursuant to a compact among six employers signed some weeks earlier. The rationale of the Board's Order was that the Supreme Court's decision in *American Ship Building Co. v. NLRB*, 380 U.S. 300, in the absence of some specific evil purpose, validates all lockouts, including a concerted lockout undertaken by competing employers not aligned in a single multi-employer bargaining unit. Because of that interpretation of *American Ship*, the Board in its 1965 decision declined to decide whether the lockout was privileged under *Buffalo Linen (NLRB v. Truck Drivers*, 353 U.S. 87) which permits employers' solidarity lockouts where they have surrendered individual bargaining authority to a joint representative and the union strikes individual employers after agreeing to a merger of separate employer units into a single bargaining unit. This Court's 1966 decision rejects the Board's *American Ship* rationale. It does so principally because the individual "impasse" lockout ruling in *American Ship* is inapplicable where separate employers shut down in concert pursuant to a binding compact to invoke a concerted "strike against all" lockout if any one is struck by the union.

The Board's Supplemental Decision and Order of June 29, 1967 once again dismisses the complaint (*infra*, Appendix, p. 1a). Stating that "With all due respect for the Court, we view the matter differently" from this Court's 1966 opinion questioning applicability of *American Ship*, the Board wholly reaffirms the bargaining impasse rationale of *American Ship* which

this Court has rejected. It does so even though a formal employer admission in the remanded proceedings strongly reinforces this Court's stated doubts about recourse to a "bargaining impasse" theory to justify what the employers themselves at all times viewed as a solidarity lockout. In the Supplemental Brief (p. 23) for the employers filed before the NLRB in November 1966 in the remanded proceedings, they confessed what was at the very heart of this Court's doubts—that if they had "*been under no obligation to lockout under the Association agreement . . . it is unlikely that all or, in fact, any of the respondent companies would have locked out in mere sympathy for their competitors.*" In the face of this candid confession by the employers that there would have been no concerted lockout absent the solidarity-lockout compact among them, the Board blandly rules again in its Supplemental Decision that this lockout pursuant to a binding "strike against all" compact among competing companies is validated because the employers *might* have locked out voluntarily after a bargaining impasse had they anticipated the *American Ship* decision. But, unwilling to depend upon this *American Ship* rationale in the face of this Court's earlier decision, the Board seeks to buttress its position with a belated ruling that a multi-employer bargaining unit *was* formed by the employers and accepted by the unions in conformity with *Buffalo Linen*. It does so in the unprecedented setting of an employer association whose chief ingredients were concealed from the unions and in the absence of any expressed union agreement to a merged bargaining unit. We set forth below the full sequence of events relevant to both the *American Ship* and *Buffalo Linen* issues.

1. Past Collective Bargaining History

Collective bargaining by IWA and LSW with the Western lumber employers has historically been in separate,

single-employer or single-plant bargaining units (J.A. 353).¹ Employers and unions have alternately joined and withdrawn at will from loose employer associations and union councils, which have acted as non-exclusive bargaining agents for their respective principals. These associations and councils have concluded tentative agreements transmitted to their principals as recommendations, and the individual employers and local unions have reserved unto themselves the absolute right to accept or reject any association-council recommendations (J.A. 15). Single employer separate plant units as established by Labor Board certifications were thus adhered to by mutual agreement and practice of employers and unions in the acceptance and conclusion of each new collective bargaining contract.²

2. Formation of the Big Six Association

The 1963 lumber industry lockout was born from the imagination and energy of Fred Lowry Wyatt, a top official and presently Vice President of Weyerhaeuser Company (J.A. 94), which is a leader in the Western Lumber industry. In 1962 Wyatt concerned himself with the forthcoming 1963 contract reopening for Weyerhaeuser and other leading lumber producers with the two major unions representing their employees—IWA and LSW. He correctly anticipated a major wage increase demand by the

¹ "J.A." references are to the Joint Appendix in No. 19,842, the predecessor appeal which this Court remanded for further Labor Board consideration. On October 27, 1967, upon application by petitioners, the Chief Judge ordered "that the joint appendix heretofore filed in Case No. 19,842 shall be deemed treated as though filed in this case." The only new matter of record in the remanded Board proceeding is the Supplemental Decision and Order of the Board, which is printed *infra* in the Appendix, pp. 1a-12a.

² As explained in the Board hearings by the employers' own witness Wyatt:

"The list of independents changed from year to year and bargaining to bargaining, as did the character and structure of the various associations."

unions; he feared that by resort to strikes against individual producers—which had proved effective before (J.A. 14-15)—the unions might achieve successive employer acquiescences in their demands. Wyatt also resolved to advance Weyerhaeuser's major objective of a continuous 7-day operation of plants without weekend overtime, in lieu of the prevailing 5-day week agreements (J.A. 131; 176; 194). Wyatt hoped to establish an industry-wide 7-day "pattern" (J.A. 155-157) which would "hold the product cost in line and make the product more competitive with substitute materials in the market place" (J.A. 177).

In response to these considerations (see J.A. 104-111), Wyatt set about soliciting other major lumber producers to join an association bound to a concerted lockout in the event of a union strike against any employer. Beginning in the latter part of 1962 (J.A. 108), Wyatt met repeatedly with representatives of major producers in the industry to persuade them to accept his plan. In a legal memorandum distributed to the proposed members, it was emphasized that an employer association might secure the right to a concerted lockout in case of a strike against any. The memorandum, presented to the employers on December 12, 1962 (G.C. 49, p. 1),³ focussed significantly upon the lockout as principal objective of a "*strike against all*" agreement:

"The subcommittee's specific assignment was to study, analyze and report on the possibilities for a

The common denominator of the various associations was probably the fact that they were never organized [on a] fully-bound basis. The result of bargaining through these associations was typically a recommendation . . . to their members . . . as opposed to being bound to a common result if that result was unsatisfactory to any member . . . [T]his has been the case in the industry . . . right up until 1963" (J.A. 98).

³ References herein to "G.C." and "R." denote Exhibits of the General Counsel or of the Respondents before the Board, copies of which were filed with this Court in No. 19,842 in lieu of extensive printing in the Joint Appendix.

formal organization or association of the participants for bargaining collectively with the IWA and LSW, specifically being bound together to the extent that a strike against one participant would be a strike against all participants. Participants have expressed concern with regard to whether, or within what limitations, the law, as interpreted by the Board and Courts, would permit 'strike against all' action. Presumably, some participants, at least, desire clarification of the status of the law prior to making the decision whether it wishes to associate itself with other participants in a 'strike against all' agreement."

Wyatt's persistent negotiations with the other leading manufacturers proved successful. Early in 1963 six major producers decided to form an association, and the formal Association Agreement was signed between April 15 and 22 by Weyerhaeuser Co., Crown Zellerbach Corp., Rayonier Inc., International Paper Co., U.S. Plywood Co., and St. Regis Paper Co. (J.A. 22). The agreement bound each employer to a lockout of unionized workers in the event of a strike against any employer on a bargaining issue (R. 206).

The provisions of the Association Agreement (R. 206), when compared with earlier drafts circulated among the companies (R. 243, R. 247, R. 265, R. 268, R. 269), derogate from the subsequent claim of employer solidarity. Thus, the draft provision (Par. (5) and (6)) for a majority vote among the six employers governing as the decision of the Association became a 75% rule permitting veto by a minority by the time of the final version (Tr. 891). The original draft stipulation (Par. (5)) that an Association decision on any issue "shall be binding on all the companies" was removed. Finally, the draft provision (Par. (6)) that "the companies shall bargain as a unit" was excised and "voluntary" was inserted in the designation of

the organization in the first paragraph of the Association Agreement concluded in April of 1963.

These illuminating alterations and omissions in the drafts of the employers' agreement first came to light in the Board proceedings. The doubts they raise as to the nature of the employers' association are underlined by the representations made in separate meetings between the "Big Six" and each of the unions immediately after the Association was formed. In these sessions and at all times to the eve of the June 7 lockout, the text of the Association Agreement was concealed from the unions (J.A. 370, 394), and material elements of the Association's purpose, its lockout compact (see J.A. 421), and its structure (J.A. 71), were consciously withheld from the unions for fear that disclosure would preclude their acquiescence in negotiating with the new Association.

3. The Pre-Lockout Meetings

The first Big Six meeting with the IWA was held on April 24, 1963, and the first meeting with the LSW commenced on May 9, 1963. Each began with some discussion of the new bargaining format. In the individual notices sent by each of the six employers to the unions requesting commencement of negotiations (J.A. 22-24),⁴ that format

⁴ "This is to advise you that the undersigned Company is a member of a voluntary multi-employer Association, herein called the "Association" comprised of the following named employer Companies in the wood products industry:

Crown Zellerbach Corporation
International Paper Company, Long-Bell Div.
Rayonier, Inc.
St. Regis Paper Company
United States Plywood Corporation
Weyerhaeuser Company

"We hereby notify you that this Company hereby delegates to the Association authority to bargain collectively on and with respect to any revisions of the existing agreements between your Union and this Company at its operation named on the attached list, pertaining to all matters which involve the wages, hours or other conditions of employment

had been calculatedly left vague. These separate notices requested the union to meet with "the Association and this Company", made no reference to any contemplated multi-employer bargaining unit or to employer commitment to be bound by any Association settlement, and suppressed the existence of the Association Agreement among the Big Six and its clause pledging the six employers to a concerted "strike against all" lockout (see J.A. 39). These facts, later brought forth in the Board proceeding, remained purposely obscured by the employer representations to the unions in the meetings preceding the June lockout.

i. *IWA Meetings.* In the opening meeting with the IWA on April 24, Association spokesman Wyatt and the participating representatives of the six employers volunteered absolutely no information to the union about the nature of the

of employees of this Company represented by your Union at such locations, other than the subjects of (1) pensions, (2) union security, (3) health and welfare, and (4) those issues which have been customarily subject to local negotiations.

"The subjects of pensions, union security, health and welfare, and local issues, and all matters pertaining thereto have been and are hereby specifically reserved and excepted from the delegation mentioned above, and if properly opened for bargaining, shall be subject to collective bargaining negotiations between your Union and this Company, separate and apart from any collective bargaining conducted between your Union and the Association in accordance with the delegation aforesaid.

"We further notify you that this Company through the Association desires to change the terms of the said existing agreements with respect to (i) hours of labor, (ii) overtime, and (iii) grievance procedure, including, without limitation all matters relevant thereto.

"The Association and this Company will be prepared to meet with you for the purposes indicated at mutually convenient times and places. Please let us know your desires in such regard. The secretary of the Association bargaining committee is:

Mr. E. M. Boddy
Crown Zellerbach Corporation
1100 Public Service Building
Portland 4, Oregon

"All notices and communications from your negotiating committee to the Association may appropriately be directed to Mr. Boddy. Notices and communications intended individually to this Company may be forwarded to the undersigned."

new Association. Employer desire for a multi-employer unit was never stated (J.A. 498). For all that had been disclosed and made to appear (J.A. 498-499), the Association was no different from any of the previous loose employer associations wholly lacking multi-employer binding authority—including the most recent Timber Operators' Council whose negotiations with the unions in 1961 had ended when individual employers withdrew therefrom and concluded separate agreements in separate bargaining. The only intimation to IWA that any more was intended by the new Association was the verbal statement by Wyatt to IWA's Nelson at the April 24 meeting that the Association was prepared "to reach a binding agreement" (J.A. 27).

This single verbal representation by Wyatt of "binding" power was *immediately visibly impugned* when IWA's Nelson challenged Wyatt's claim by pointing out that Association member U.S. Plywood had independently opened for individual bargaining the central issue of hours of work and overtime (J.A. 27-28). This was manifestly contrary to any claim that there had been a "binding" delegation by each employer of authority to the Association to settle all wage-hour matters. Thereupon, instead of resolving this critical issue of Association authority (see J.A. 463), the subsequent events manifested to the IWA precisely the absence of such authority (J.A. 546). For in the agonized employer discussions which took place during the two days following the April 24 opening, not only did U.S. Plywood adamantly adhere to its independent bargaining insistence (J.A. 30-32), but in further contradiction of the claim of "binding" delegation Wyatt revealed to IWA that U.S. Plywood was threatening to leave the group and that he did not know whether he could hold the Association together (J.A. 32, n. 18; 80).

In the three days of meetings which commenced on April 24, the employers thus failed to resolve the question of

Association authority. With Wyatt unable to assure IWA that it would not have to bargain a wage-hour settlement with the Association and then all over again with each individual employer, IWA proposed that format and authority questions be temporarily "set aside" and that the parties address themselves to substantive issues (J.A. 33; 187-188). Discussion of substantive contract terms thereupon commenced. Thus matters remained to the time of the June lockout, with U.S. Plywood steadfast upon bargaining separately on hours and overtime and the single verbal claim by Wyatt of "binding" authority still impugned rather than in any way substantiated.

There were six meetings between IWA and the Big Six Association between April 29 and June 4. The question of Association authority to act as a binding agent having been "set aside" at the meeting of April 26th by agreement of both IWA and the Big Six, the subject was not again mentioned in these sessions. No agreements were reached either on contract matters or on Association authority prior to the lockout itself.

ii. *LSW Meetings.* The first Big Six meeting with the LSW, on May 9, 1963, had a different character from the opening meeting with the IWA. LSW was desirous of forming a full multi-employer bargaining basis in the industry. It hoped that the new Association would conclude a single master agreement for all six employers, and other employers as well, giving LSW firm protection against rival-union membership raids at individual companies and locations.

LSW representative Johnston started the May 9 meeting with extensive questioning of Wyatt about the new Association (J.A. 578-579). Aware of LSW's affirmative interest in the protections of a multi-employer contract (see J.A. 19), Wyatt revealed a number of points in this discussion which he never made manifest to the IWA. He admitted that the employers contemplated concerted lockout action in the event of a strike, without revealing that they

had formally bound themselves to do so (J.A. 580; 596). He asserted that there was "one person authorized to sign for the Association" (J.A. 302). He conceded the existence of an Association Agreement, though refusing to produce it for LSW's examination when requested to do so. As the Board's Trial Examiner subsequently found (J.A. 71), Wyatt was zealous to preclude knowledge by LSW that a 75% or minority employer veto rule rather than majority rule governed the Association's procedure for reaching a decision. Wyatt feared that the LSW would decline to commence negotiations with the Association if advised of veto power by a minority of the more intransigent members of the Big Six.

While stimulating LSW's interest in commencing negotiations with the new Association (see J.A. 41-42), Wyatt steadfastly declined LSW's requested guarantees of the protections of industry-wide bargaining (J.A. 42-45). He refused LSW's demands for a master agreement resulting from the negotiations (J.A. 299-300), for the inclusion in the Association of excluded employer plants east of the Cascades (J.A. 296-297), and for incorporation of three excluded major bargaining subjects—union security, pensions, and health and welfare (J.A. 579-580). As in the case of the first Big Six-IWA session, the discussions with LSW thus failed to produce a meeting of the minds on the nature and scope of the new bargaining format. Accordingly, on May 9 the parties commenced discussions on substantive matters, agreeing to leave the format issues in abeyance for later resolution (J.A. 583). This was after LSW expressly stated (J.A. 579; 41) that it was not recognizing the Big Six Association as bargaining representative until and unless the three major issues were satisfactorily resolved—commitment to an overall master agreement resulting from the discussions, inclusion of excluded units east of the Cascades, and the incorporation of the three major excluded bargaining subjects. As in the case

of IWA, subsequent discussions on wage and hours matters produced no agreement between the parties; nor did they reach any meeting of minds prior to the lockout on the issues of Association scope and authority (J.A. 589; 592-593; 48-50).

4. The Concerted Lockout

The principal contracts between the unions and the six employers expired on June 1, 1963 (J.A. 19). On June 3 and 4, meetings were held between each union and the Big Six, but no agreements were reached either on substantive issues or on the Association format and authority questions which had arisen at the first meeting with each union. On June 4, both unions announced that strikes would commence against two employers—St. Regis and U.S. Plywood—and such strikes did begin on the following day. In a perfunctory meeting among the Big Six on June 5, the concerted lockout was formally activated in accordance with the requirement of the Association Agreement (G.C. 63); on June 7 the remaining four employers in the Association locked out all employees represented by IWA or LSW for the announced reason "to protect the interests of our group against this selective strike . . ." (R. 28; J.A. 54).

The lockout lasted for approximately two months, during which meetings between the employers and the unions produced no tangible progress toward a settlement. On August 7, 1963, without any understandings having been reached with either union, and while the strikes against St. Regis and U. S. Plywood still continued (J.A. 602), the four companies ended their lockout (J.A. 265; 64-65). In renewed negotiations commencing on August 12, 1963, the employers offered major wage concessions, omitting their principal earlier demand for 7-day operations without weekend overtime (J.A. 66). After further negotiations, a general settlement was reached on

August 13, 1963, new contracts were concluded with each employer, and the strikes against St. Regis and U. S. Plywood were ended thereafter (J.A. 602).

Meanwhile, charges asserting the unlawfulness of the concerted lockout had been filed by the unions in June with the National Labor Relations Board. Following issuance of a formal complaint by the Board's General Counsel and answer by the Association, the case was referred for hearing to Board Examiner Hemingway. The issue for trial was framed by the employers' answer alleging that their lockout was for the "*sole purpose*" of "preserving the multi-employer bargaining basis from the disintegration threatened" by the June 5 strikes against two of the six employers.

5. Trial Examiner's Hearing and Report.

The Labor Board's formal hearing commenced before the Trial Examiner on April 14, 1964 and lasted for some six weeks. The trial transcript exceeds 2,000 pages, and hundreds of exhibits were offered and made part of the record. The trial centered on the two focal issues governing the legitimacy of a multi-employer "solidarity" lockout: (1) whether the employer group had the necessary authority to constitute a binding bargaining unit rather than a mere voluntary association of individual employers for simultaneous bargaining, and (2) whether the unions had by acquiescence given life to a new multi-employer unit bargaining basis, thus authorizing the employers to invoke a *Buffalo Linen* lockout for protection of that unit's solidarity. On April 5, 1965, the Trial Examiner issued a lengthy Intermediate Report (J.A. 6-93), ruling for the employers on both counts and accordingly recommending that the Board find the lockout not in violation of the National Labor Relations Act.

6. The Board's 1965 Decision

On November 16, 1965, the Board issued a curt opinion (J.A. 1), upholding the Big Six lockout on a totally different justification from that advanced by the employers at the time of their lockout and litigated by them at the Board trial. Finding that prior to the lockout "all six Employers had reached an impasse with the Unions over certain of the economic items being negotiated" (J.A. 3), the Board purported on that ground to apply the Supreme Court's decision in *American Ship Building Co. v. NLRB*, 380 U.S. 300. Said the Board (J.A. 4):

"Even assuming . . . that the Respondents were mistaken as a matter of law with respect to either the establishment or the recognition of the Association as a multiemployer unit, we find that the principles announced by the Supreme Court in *American Ship Building* and *Brown* apply to the situation where, as here . . . an impasse in negotiations is reached over a mandatory subject of bargaining, and the union strikes only some of the employers. . . ."

Even more surprising than the summary disposition of the case on an "impasse" in bargaining which had never been asserted by the employers as the cause or object of their lockout, was the Board's own demonstration of the critical difference between *American Ship Building* and this case. For the Board itself (J.A. 3) quoted *American Ship Building* as having validated a post-impasse lockout by an employer "for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position", and in the same breath the Board conceded (J.A. 4) that in this case the employers "closed their plants for the purpose of preserving the integrity" of their Association against a selective strike.

This manifest disparity obviously troubled the Board; in an effort to get around the disparity, the Board asserted

(J.A. 4) that the lockout was for the purpose of preserving the integrity of the Association "and [also] in furtherance of the bargaining position advanced jointly for all six Employers by the Association." But such sleight of hand could not bridge the legal gap between an individual "impasse" lockout, such as in *American Ship Building*, and this multi-employer "solidarity" lockout. As we showed to this Court's satisfaction, the companies publicly announced, judicially admitted, and themselves sought to prove, that they locked out pursuant to their prior solidarity-protection pledge.

7. This Court's 1966 Opinion

Petitioners argued to this Court on review of the Board's 1965 Decision, that the validation of the Big Six lockout upon an "economic impasse" rationale could not stand, because the entire record demonstrates that the Big Six lockout was undertaken solely pursuant to a prior binding compact among the employers to come to the aid of any struck Association member by a concerted lockout. It was emphasized to this Court that *American Ship* involving a voluntary single employer "impasse" lockout has nothing to do with a concerted "solidarity" lockout pursuant to a compact to aid a struck competitor.

This Court's opinion remanding the Board's 1965 decision for further consideration (125 App. D.C. 1, 365 F. 2d 934) accepted our argument and rejected the Board's facile disposition of the case on an *American Ship* rationale. The Court noted (at p. 938) that a rationalization based on the thought that the individual employers *might* have locked out separately because of economic impasse "would appear to merit more analysis by way of justification" than the Board provided, particularly "when the competitor-employers have said on the record that they locked out simultaneously in support of each other". And to the suggestion that a concerted lockout pursuant to a

compact to support a struck employer is somehow interchangeable with an *American Ship* lockout voluntarily undertaken by a single employer because of a bargaining impasse, this Court gave its answer in no uncertain terms (p. 935):

"... the Board's decision in effect attributes to the employers a motivation for the lockout other than the one they alleged in their pleadings and sought to prove by their evidence. The employers insisted throughout the hearings that the lockout was ordered solely for the purpose of protecting the integrity of the multi-employer unit in the bargaining negotiations. The Board has, however, now said in substance that, if the employers had known of their rights as they were later to be adumbrated in *American Ship*, they could legally have done the same thing, even without a multi-employer unit, as a response to a bargaining impasse. But, even if they could, no one can say for certain after the fact that they would. There might well have been reasons why some or all of the four employers in question would, absent a purpose to protect a bargaining unit, have delayed or foregone the exercise of an *American Ship* prerogative. To be able to keep on doing business while a competitor is shut down is not a uniformly unhappy condition, as the history of the lumber industry indicates. It could with reason, therefore, be urged that the employers must have their rights in this litigation adjudged by reference to the motivation upon which they *acted* rather than one upon which they *might have acted*."

The Court remanded the case for further proceedings. In those proceedings, as we have noted (*supra*, p. 3), the employers confessed the genuineness of this Court's objection to the *American Ship* rationalization, for they conceded that had they "been under no obligation to lockout

under the Association agreement . . . it is unlikely that all or, in fact, any of the respondent companies would have locked out . . ."

8. *The Board's Supplemental Decision and Order*

The Board's Supplemental Decision and Order, issued on June 29, 1967, reaffirms the *American Ship* rationale rejected by this Court's 1966 opinion, the Board stating that: "With all due respect for the Court, we view the matter differently" (*infra*, pp. 7a-12a). In its adherence to the *American Ship* theory in this case (and in its companion ruling of June 29, 1967 in the Detroit News case),⁵ the Board avoids entirely the nub of the concern reflected in this Court's remand opinion. Therein the Court repeatedly pointed out that a lockout pursuant to a compact requiring competitors to shut down if a strike is called against any of them is not identical either in law or fact to a lockout by an individual employer under the "*American Ship* prerogative". The Board's eloquent silence concerning that critical point of this Court's remand opinion likely results from the devastating admission on this score in the Supplemental Brief for

⁵ In *Evening News Association*, 166 NLRB No. 6, decided on the same day as the instant case, the Board reversed its earlier ruling holding illegal the lockout of employees of the Detroit News after the Teamsters struck its competitor, the Free Press. The News had promised in advance that in case of strike against the Free Press it "would support the Free Press and would not publish", and as the Board states the lockout itself had "this stated purpose". Nevertheless, relying exclusively on the *American Ship* decision, the Board now finds that the lockout was equally prompted and justified by an individual bargaining impasse in negotiations between the News and the Teamsters.

In a dissenting opinion Member Brown argues that in *American Ship* the Supreme Court "meticulously" limited its ruling to "post-impasse lock-outs". Accordingly, Member Brown finds "no justification for the Board now to extend such holding to absolve an employer who locked out his employees, not because of a bargaining impasse concerning his own employees, but to assist another employer in a labor dispute respecting terms and conditions of employment of the other employer's employees in their own separate unit." Consistent with that view, in the instant case Member Brown does not join the *American Ship* portion of the Board's Decision and Order (*infra*, p. 12a, n. 21).

the employers: that if they "would have been under no obligation to lockout under the Association agreement . . . it is unlikely that all or, in fact, any of the respondent companies would have locked out . . ." Faced with this conclusive confession the Board simply chose to disregard this Court's objection that the employers "must have their rights in this litigation adjudged by reference to the motivation upon which they *acted* [support of a struck competitor] rather than one upon which they *might* have acted" [bargaining impasse]."

Unable to answer this Court's reasoning on *American Ship* but unwilling to abandon its own earlier reliance thereon, the Board's supplemental decision purports to find the employer delegation of individual bargaining power and the union acceptance of a merged multi-employer unit which invokes the concerted lockout privilege of *Buffalo Linen* (*infra*, pp. 1a-7a). But there is a hollow ring to this eleventh hour effort to salvage the Board's position on a ground other than the *American Ship* theory already rejected by this Court. Thus the Board's new decision is wholly unable to answer any of our three central objections to invocation of the *Buffalo Linen* rule: (1) The unrefuted demonstration that the Association was merely a loose format of bargaining convenience in which individual employer bargaining power was retained is simply disregarded by the Board; not a word appears to answer the contemporaneous testimonial confession by Association leader Wyatt in a California proceeding in August of 1963 that any single employer had the power to preclude a group settlement; (2) On the issue of union acceptance the Board finds that the mere willingness of the unions to bargain with the ill-defined new entity constituted acceptance of a multi-employer unit; the Board simply brushes by the fact that the formal bargaining invitations from each separate employer to negotiate with the new "voluntary" Association "and this Company" scrupu-

lously avoided any suggestion concerning a merger of existing bargaining units or creation of a multi-employer unit; (3) The Board has no answer at all to our chief objection that material elements of the employers' compact, including particularly the minority veto provision, were purposely concealed from the unions for fear that disclosure would preclude their willingness to negotiate with the Association.

The Board's belated and unpersuasive recourse to *Buffalo Linen* shows the same defect revealed in the *American Ship* portion of its ruling. That defect, of controlling significance in the present case, is that without actual and informed union consent to a merger of bargaining units, the employers invoked a concerted lockout in answer to a strike against their competitors. As we show in the Argument, their lockout boycott of the unions and their members is wholly inconsistent with the guarantees and prohibitions of national labor law.

Statutes Involved

Section 8 (29 U.S.C.A. § 158)—Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this title;

...

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

Statement of Points

1. The Board erred in deeming the concerted "strike against all" lockout validated by the *American Ship* privi-

lege of an individual employer voluntarily to resort to an "impasse" lockout.

2. The Board equally erred in ruling that the employers formed and the unions agreed to a merged multi-employer unit, invoking the solidarity-lockout privilege of *Buffalo Linen*.

Summary of Argument

I

Four employers locked out their employees (members of the IWA and LSW) pursuant to an agreement they had made among themselves and with two other employers who had been struck by the unions. This concerted lockout in aid of struck competitors in separate bargaining units violated Sections 8(a)(1) and (3) of the National Labor Relations Act.

The Labor Board's decision under review simply reasserts the Board view that *American Ship* validates concerted lockout arrangements between competing employers. The Board wholly failed to respond to the objections raised to that view by this Court in its initial opinion; we might deem that conclusive and end the matter there. We believe it more helpful to the Court, however, to set forth fully in the Argument the three grounds upon which the result achieved by the Board's *American Ship* rationale is wholly at odds with the command and intent of the NLRA:

First, Sections 8(a)(1) and (3) are violated by a lockout of unionized employees because their union has struck an employer in a separate bargaining unit. The lay-off of the employees locked out by the four employers here was discrimination against them, since the occasion for the denial of work to them was their membership in unions on strike against other employers. The lockout here is thus a blatant violation of the right of unionized employees not to be penalized by lay-off merely because of their union membership.

Second, a gross imbalance results if the "neutral" employer whom the union is forbidden to strike by Section 8(b)(4) may nevertheless give support to a struck primary employer by a lockout of his unionized employees. We deem it axiomatic that Congress could not simultaneously have intended to secure "neutral" employers and their workers from involvement in a labor dispute with another employer at the behest of a union while permitting the "neutral" employer to precipitate such involvement by a lockout in aid of a primary employer struck by the union. The policy against achieving an incongruous result in construing federal legislation requires the finding that the NLRA which forbids the union to boycott the secondary employer equally forbids the secondary employer to boycott the union.

Third, the National Labor Relations Act should be construed not to sanction employer boycotts violating federal antitrust norms. Where two or more employers combine in employee boycott compacts governing hiring, wages, or other employment matters, they violate the Sherman Act. From every point of view—competitor wage-fixing, concerted boycott, and industry competition elimination—in its making and execution the "strike against all" lockout compact violated the antitrust laws. Since federal regulatory statutes should, if at all possible, be interpreted in consonance rather than in conflict with federal antitrust norms, the NLRA must be read to bar concerted employer lockout action so clearly and so long forbidden by the antitrust laws.

II

Unable to answer this Court's reasoning on *American Ship* and unwilling to depend on its already-rejected reliance thereon, the Board's ruling now under review purports to find a multi-employer unit under *Buffalo Linen*. Since the Board's view of *American Ship* renders the multi-

employer unit doctrine of *Buffalo Linen* totally without significance, it is not surprising that the Board now finds employer solidarity and union acceptance of a multi-employer unit under circumstances unprecedented in its previous *Buffalo Linen* adjudications.

But the simple fact is that the Big Six lockout was not privileged under *Buffalo Linen* for the most obvious of reasons. The Big Six Association lacked the individual employer's surrender of bargaining authority required under *Buffalo Linen*. The unions did not agree to a multi-employer bargaining unit. The employers' concealment of material conditions of their association compact vitiated any consent to a multi-employer unit. And, as though this were not enough, counsel for the employers made perfectly clear during his oral argument before this Court in 1966 that there was no employer intent at the time they formed their Association to create a multi-employer unit; he even had the temerity to suggest that the Association Agreement among the employers was "none of the union's business". Under these circumstances the Board is no more persuasive in its *Buffalo Linen* effort than in its use of *American Ship* to validate this concerted "strike against all" lockout of workers because their union has struck competing employers in the industry.

Argument

Until the Board's original Decision and Order in this case, it had historically deemed concerted lockouts by a group of employers permissible under the National Labor Relations Act only if—within the *Buffalo Linen* exception —there had been a merger of separate bargaining units agreed to by a group of employers and accepted by the union. The principal issue on this Court's first review of the present case was whether the Labor Board erred in ruling that the Supreme Court's *American Ship* decision validates a concerted multi-employer lockout in aid of a

struck competitor in a separate bargaining unit. This Court's 1966 opinion accepted the unions' demonstration of the critical difference between single employer and multi-employer lockouts, and declined to find in *American Ship* any approval of concerted multi-employer lockouts. Accordingly, the Court remanded the case with an invitation to the Board to suggest more cogent reasons for approving a concerted lockout of unionized workers in aid of a competitor whom the union has struck.

The Board's Supplemental Decision adds nothing material to its earlier ruling on the *American Ship* aspect of this case. Instead of any new insight, the Board states its "respectful" disagreement with this Court, and once more insists that *American Ship* sanctions not only a single employer "impasse" lockout but also a concerted "strike against all" lockout by pre-arrangement between competing employers. In Point I below we show again the error of that view, which would validate secondary lockouts the NLRA was clearly intended to forbid.

In addition to its reaffirmation of the *American Ship* rationale, the Board now purports to find a *Buffalo Linen* merger of separate bargaining units in this case. We challenge that ruling in Point II of the Argument. There we show that the Board's belated finding of employer surrender of individual bargaining power and union agreement to a multi-employer unit flouts the record and distorts established rules making good faith disclosure by the offeror and informed acceptance by the offeree the necessary ingredients of a binding agreement.

I

A Concerted Lockout to Aid a Struck Competitor in a Separate Bargaining Unit Violates Sections 8(a)(1) and (3) of the National Labor Relations Act.

Without deigning to discuss or refute the compelling considerations set forth in this Court's 1966 opinion,

the Board simply reasserts its view that the *American Ship* decision validates concerted lockout arrangements between competing employers. The Board has failed to respond to the objections raised by this Court in its initial opinion; we might deem that conclusive and stop the argument on this point here. Nevertheless, we believe it more helpful to the Court to set forth fully the several grounds upon which the result achieved by the Board's *American Ship* rationale is wholly at odds with the statute's command and intent. To that end we demonstrate in the following discussion that (A) Sections 8(a)(1) and (3) which protect the right to strike are clearly violated by a "strike against all" concerted lockout of unionized employees in response to a strike by their union against an employer in a separate bargaining unit (*infra*, pp. 24 to 31), (B) a gross statutory incongruity results if the "neutral" employer, whom the union is forbidden by Section 8(b)(4) to strike, may nevertheless lend his lockout support to a struck primary employer (*infra*, pp. 31 to 35) and (C) the National Labor Relations Act should not be construed to sanction concerted employer boycotts so clearly and long forbidden by federal anti-trust statutes (*infra*, pp. 35 to 47). In the Conclusion to Point I (*infra*, pp. 47 to 51) we answer the Board's repetition of the faulty rationalization that this "strike against all" lockout can be validated because a bargaining impasse existed and members of the Association had an "economic interest" in preventing their competitors' individual settlements with the union.

A. Sections 8(a)(1) and (3) Are Violated By a Lockout of Unionized Employees Because Their Union Has Struck an Employer in a Separate Bargaining Unit.

If there is any right which Section 7 of the NLRA most clearly protects and with which an employer is forbidden to interfere by Section 8(a)(1), it is the right to strike. That right is also encompassed in the concept of "union

membership" which the employer may not discourage by "discrimination" within the meaning of Section 8(a)(3). Congress' solicitude for the right to strike is further demonstrated by Section 2(3) which expressly protects the employee status of strikers, and by Section 13 which provides that nothing in the Act, "except as specifically provided for herein," shall be construed so as to interfere with the right to strike.

Together, these provisions embody a firm legislative policy to preserve the right to strike as an indispensable adjunct of collective bargaining. "*Collective bargaining, with the right to strike at its core, is the essence of the federal scheme*". *Bus Employees v. Missouri*, 374 U.S. 74, 82. This proposition will hardly be controverted by the Board; we cite only a few of the numerous supporting decisions. *Labor Board v. Mackay Co.*, 304 U.S. 333, 347; *Automobile Workers v. O'Brien*, 339 U.S. 454, 457; *Bus Employees v. Wisconsin Board*, 340 U.S. 383; *Labor Board v. Drivers Local Union*, 362 U.S. 274, 282; *Labor Board v. Washington Aluminum Co.*, 370 U.S. 9, 12-14; *Labor Board v. Erie Resistor Corp.*, 373 U.S. 221, 233; *Labor Board v. Great Dane Trailers*, 388 U.S. 26; *NLRB v. United States Cold Storage Corp.*, 203 F. 2d 924, 927 (C.A. 5), cert. denied, 346 U.S. 818; *NLRB v. Industrial Cotton Mills*, 208 F. 2d 87, 91 (C.A. 4), cert. denied, 347 U.S. 935; *NLRB v. David Friedland Painting Co.*, 377 F. 2d 983, 986 (C.A. 3).

In *Morand Bros. Beverage Co.*, 91 NLRB 409, enfd. 204 F. 2d 529 (C.A. 7) and *Davis Furniture Co.*, 94 NLRB 279, 100 NLRB 1016, enf. den. 205 F. 2d 355 (C.A. 9), the Board held concerted lockouts illegal even where a multi-employer bargaining unit existed. Some years later, in 1954, the Board partially reversed its position and ruled in *Buffalo Linen* (109 NLRB 447) that where the union has voluntarily accepted a merger of separate employer bargaining units all the employers may invoke a lockout in response to a

strike against a single member. But in the absence—as here—of union agreement to merger of separate units, the Board's *Morand-Davis* rationale remains fully applicable (91 NLRB at 412-413):

"The fact that the expected strike may be so timed or so directed as to place severe economic pressure on the employer does not, in our judgment, remove the strikers from the protection of the Act. Strike activity, actual or threatened, is concerted activity, and concerted activity does not cease to be protected merely because it is, or may be, effective, or because it subjects the employer to economic hardship.

Any other view would not only be in derogation of the right of employees to engage in concerted activities, but would also conflict with the express policy of the Act to minimize industrial strife. . . . Thus, if in the instant case we accepted the Respondents' view . . . , we would be required to hold that a strike against one Respondent . . . directly involving only about 60 of its employees, justified the other 34 Respondents in discharging about 700 of their employees, *even though they had not participated in the strike but had, in fact, remained at work*. As stated in the brief filed on behalf of the General Counsel in support of the Intermediate Report: In this case, the effect of granting immunity to the discriminatory lock-out by 34 employers, in reprisal against the strike against a 35th employer, would be to multiply the obstruction to commerce. It would set a sweeping precedent for the conversion of any single employer's dispute into an association-wide or industry-wide dispute. An isolated skirmish would become a civil war.

. . . The logical corollary of the Respondent's position is, therefore, that a union seeking to negotiate a contract with a group of employers, however large, must strike all or none. If it strikes less than all, its

members will be deprived of the protection of the Act; if it strikes all, they will be protected. We cannot give such an incongruous construction to an Act designed to minimize industrial strife."

Under the governing principle protecting the right to strike, the Board has assumed from its earliest days that a lockout of employees to support another employer against whom a strike is in progress violates the statute.⁶ Until the present case the Board has never ruled or even implied that an employer in one bargaining unit may lock out his unionized workers to support a competitor struck by the union. Fundamental rights protected by Sections 8(a)(1) and (3) require a contrary conclusion.

Thus, from the point of view of the employees locked out by the four employers here, it is clear that their layoff was discrimination against them forbidden by the statute and interfered with their protected right of unionism, since the

⁶ The Board had consistently ruled unlawful a lockout in support of an employer's bargaining demands, or in opposition to union organizing,—in fact, any lockout "motivated by a purpose to interfere with and defeat its employees' union activities". *Pepsi-Cola Bottling Co.*, 72 NLRB 601, 602; *Hopwood Retinning Co., Inc.*, 4 NLRB 922, modified in other respects and enforced, 98 F. 2d 97 (C.A. 2); *Mall Tool Co.*, 25 NLRB 771; *Cowell Portland Cement Co.*, 40 NLRB 652; *National Garment Co.*, 69 NLRB 1208; *Sifers Candy Co.*, 75 NLRB 296; *Goodyear Footwear Corp.*, 80 NLRB 800; *Scott Paper Box Co.*, 81 NLRB 535. The only lockouts ruled lawful were those which the Board found motivated by economic considerations, such as material spoilage, or by other interests completely divorced from employee concerted activities. *Lengel-Pencil Co.*, 8 NLRB 988; *Link-Belt Co.*, 26 NLRB 227; *Hobbs, Wall and Co.*, 30 NLRB 1027; *Clayton & Lambert Manufacturing Co.*, 34 NLRB 502; *Duluth Bottling Association*, 48 NLRB 1335; *Worthington Creamery and Produce Co.*, 52 NLRB 121. Since the law was clear that an employer could not lock out his employees to affect the union's bargaining demands upon him, *a fortiori* he could not lock them out to affect the union's bargaining relations with a competitor. The opinion of the Board in *Duluth Bottling Association*, 48 NLRB 1335, confirms the logic of this syllogism; there, the Board held the concerted lockout legal (at 1336) only because it "was intended solely to protect the respondents' property" and "was not intended to interfere with or discourage union activity or to minimize the effectiveness of the . . . [union's] economic weapons."

occasion for the denial of work to them was their membership in unions on strike against other employers.⁷ It is equally clear that the statutory right of the locked-out employees to *refrain* from collective action was violated by the lockout. Section 8(a)(1) protects not only their right of collective action but also their right to refrain therefrom. And as the Supreme Court recently recognized in *American Ship Building Co. v. NLRB*, 380 U.S. 300, 310, when employees are subjected to a lockout, they are in fact in the same status as if they had elected to strike. In that ruling the Supreme Court subordinated the employees' Section 8(a)(1) right not to strike to the employer's own right to invoke a lockout as a primary economic bargaining weapon. But when it comes to a secondary lockout to support a struck competitor, there is no primary right in the employer to which the Section 8(a)(1) rights of his employees must bow. On the contrary, there is then a blatant violation of the right of unionized employees not to be penalized by layoff merely because of their membership in a union which has elected to strike another employer.⁸ That

⁷ The basic principle was recently reaffirmed by the Board in *David Friedland Painting Co., Inc.*, 158 NLRB 571 (affirmed, 377 F. 2d 983). There the Board approved a Trial Examiner's ruling that a lockout of unionized employees because their union had struck another employer violates the Act. The Examiner's ruling recognized that in practical effect the outcome of a strike against a competitor may affect the economic interests of an employer; but, as the Examiner properly ruled, it has always been the law that a balancing of the employer's economic interest against the rights of its employees under Section 7 of the Act "... leads inevitably to the conclusion that the Section 7 rights of Respondent's employees are paramount. Accordingly, as the natural tendency of the lockout was to discourage union membership, since the reason for the selection of these employees for layoffs was their membership in the striking local, their discriminatory layoffs violated Section 8(a)(3) of the Act" (at 579).

⁸ Since the penalty of work denial inflicted by the employers' concerted lockout was imposed only upon employees who belong to the union and exactly because they belong to the union, no question of subjective motivation by intervenors herein arises. Disabilities imposed by employers on those who exercise their rights of unionism are *per se* unlawful under the statute. *Labor Board v. Great Dane Trailers*, 388 U.S. 26; *Labor Board v. Erie Resistor Corp.*, 373 U.S. 221.

is, indeed, the teaching of *Mine Workers v. Pennington*, 381 U.S. 657, rendered only weeks after *American Ship*.

There the Court reviewed the question whether the "national labor policy" frees competing employers to achieve forbidden antitrust objectives through the use of the union's wage-hour jurisdiction. The Court concluded (p. 666) that "there is nothing in the labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry. On the contrary, the duty to bargain unit by unit leads to a quite different conclusion." In so holding, the Court relied chiefly upon early Labor Board decisions forbidding an employer to condition his agreement with the union on its reaching concurrent or similar wage settlements with competitors. The Court pointed (pp. 666-67) to Board authorities forbidding an employer "to condition the signing of a collective bargaining agreement on the union's organization of a majority of the industry", and barring employer reservation of agreement "until five competitors had signed substantially similar contracts."⁹ Recognizing in cases of employer insistence on uniform or simultaneous settlements the "*obvious interest of the employer*" to insure "that acceptance of the union's wage demands will not adversely affect his competitive position," nevertheless the Supreme Court emphasized that the Board has "*rejected that employer interest as a justification*"

⁹ *American Range Lines, Inc.*, 13 NLRB 139, 147 (1939); *Samuel Youlin*, 22 NLRB 879, 885 (1940); *Newton Chevrolet, Inc.*, 37 NLRB 334, 341 (1941); *George P. Pilling & Son Co.*, 16 NLRB 650, enforced, 119 F.2d 32, 38 (CA 3, 1941). In addition to these cases cited by the Supreme Court in *Pennington*, the Board has applied the same rule in *Harbor Boat Building Company*, 1 NLRB 349 (1936); *Nathan Chesler*, 13 NLRB 1 (1939); *Westinghouse Electric & Manufacturing Company et al.*, 22 NLRB 147 (1940); *Allied Yarns Corp.*, 26 NLRB 1440 (1940); *Darlington Venser Company, Inc.*, 113 NLRB 1101, enforced 236 F.2d 85 (CA 4, 1956); *Arlington Asphalt Company*, 136 NLRB 742, enforced 318 F.2d 550 (CA 4, 1963). See also *Labor Board v. Borg-Warner Corp.*, 356 U.S. 342.

under the NLRA. The Court quotes and approves the Board's rulings that an employer cannot insist on a bargaining unit broader than the designated one merely "because he envisions competitive disadvantages accruing from such bargaining."

The nub of the *Pennington* holding is the Supreme Court's finding that the *national labor policy* requires bargaining "unit by unit" and does not protect—but rather repels—any employer right to prevent different or separate wage settlements by his competitor, even though they may adversely affect his economic interests.¹⁰ Thus, *Pennington* makes clear that unlike the interest of a single employer invoking a primary lockout, the interest of the neutral employer lending lockout support to a struck competitor is not an interest protected by the national labor law. It follows that such an interest cannot serve to validate a lockout of employees whose union strikes a competing employer in a separate bargaining unit. The Board's decision in the present case indulges in a complete inversion. The very employer "interest" in a competitor's wage settlement which the Supreme Court found that the national labor relations policy repels, is erected by the Board in the present case into a justification for employer interference with protected employee rights of union membership and union action.

Moreover, the absence of an employer interest in his competitors' wage settlements sufficient to validate a secondary or supportive lockout, is also underlined by Section 8(b)(4)

¹⁰ The starker contrast exists between the Supreme Court's *Pennington* interdiction of an employer's effort to control or fix the wages agreed to by his competitor and the confessed purpose of the Big Six Association. Wyatt, guiding genius of the Association, testified in this case (J.A. 130-131) that he described to the other employers that they

"needed to be reaching agreements which were binding upon all of them at the same time and that there wasn't the previous disadvantage of an individual company being concerned about coming to grips with a new procedure or a new agreement because he didn't know what others in the industry might be going to do in the same respect as to whether he might become less competitive by the fact that he might alone be asked to do it."

of the Act—the “secondary boycott” bar—which insulates neutral employers and their employees from involvement in “controversies not their own.”¹¹ It is axiomatic that when Congress in 1947 thus forbade a union to utilize a secondary strike to involve a neutral employer in its dispute with a primary employer, it left no room for the involvement of the neutral employer (and his workers) at his own instance. To permit a one-sided neutrality—which in a primary strike situation safeguards the neutral employer and his employees from a shutdown by a union boycott but not a shutdown by a reverse secondary boycott or secondary lockout—would leave the statute grossly and incongruously imbalanced. We turn now to this consideration.

B. A Gross Imbalance Results If the “Neutral” Employer Whom the Union Is Forbidden By Section 8(b)(4) to Strike, May Nevertheless Give Support by a Lockout of Unionized Employees to a Struck Primary Employer.

Whatever doubts might have been entertained under the Wagner Act concerning the illegality of secondary or competitor-support lockouts, they were laid to rest when Congress in 1947 made explicit the national labor policy against extension of a primary labor dispute to neutral employers and their workers. Prior to Taft-Hartley, labor’s rights to induce employers as customers to withhold their trade from a struck manufacturer remained secured by the Norris-LaGuardia Act. *Apex Hosiery Co. v. Leader*, 310 U.S. 469; *United States v. Hutcheson*, 312 U.S. 219. However, there was increasing opposition to untrammeled union secondary boycott power by which labor disputes were extended beyond the primary disputants to cause shut downs and interruptions to production on an industry or geographical basis. Deeming secondary strikes and boycotts unduly burdensome on commerce, in 1947 Congress—in the course of

¹¹ *NLRB v. Denver Bldg. Trades*, 341 U.S. 675, 692.

defining union unfair labor practices thereafter to be within the jurisdiction of the Labor Board—enacted Section 8(b)(4) securing neutral employers from union pressures to cease dealing with an employer with whom the union is in dispute. Section 8(b)(4) forbids a union to “engage in, or to induce or encourage” the employees of any employer “to engage in, a strike,” for such purposes, among others, as forcing any employer “to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer . . .”

Section 8(b)(4) protects “*unoffending employers and others from pressure in controversies not their own.*” *NLRB v. Denver Bldg. Trades*, 341 U.S. 675, 692. As the Supreme Court recently emphasized in *Woodwork Manufacturers v. NLRB*, 386 U.S. 612, 624, the aim of the “secondary boycott” prohibition was to bar union efforts “to draw in neutral employers” in a strike or dispute with another employer. The *Woodwork Manufacturers* opinion reviews (pp. 620-624) the seesawing battle between Congress and the Supreme Court culminating in Norris-La-Guardia’s broad exemption of union secondary boycotts from antitrust inhibition. But, as the Court finds (p. 623), “labor abuses of the broad immunity granted. . . . resulted in the Taft-Hartley Act prohibitions against secondary activities enacted in Section 8(b)(4)(A).” Congress thus “returned to the regime of *Duplex Printing Press Co. and Bedford Cut Stone Co., supra*, and barred as a secondary boycott union activity directed against a neutral employer . . .”

Taft-Hartley’s secondary boycott ban thus underlines that concerted boycotts in labor relations are an impermissible form of “ganging up” which Congress interdicted to prevent the extension of labor strife beyond the primary disputants. Congress forbade extension of labor disputes to

third party employers and their workers particularly by such means as refusal to handle "struck goods" and strikes against neutral employers and their workers involving them "in controversies not their own."

It must be self-evident that the interference with commerce and the embroilment of the "neutral" employer and his employees which Section 8(b)(4) seeks to prevent, are as directly produced if an employer shuts down to help another whom the union has struck as when the union invokes a secondary strike. A concerted shutdown pursuant to agreement between employers to aid a struck competitor is in its expansion of labor disputes beyond the disputing employer, and in the consequent interference with commerce, the exact counterpart of the secondary strike by the union. Secondary employer involvement is no more acceptable *when the neutral employer locks out the union* than *when the union strikes the neutral employer* because of its dispute with another employer. No more than the union may strike the neutral may the neutral lock out the union. The employer, freed by Section 8(b)(4) from a secondary strike, must be held forbidden by Section 8(a)(1) to invoke a secondary lockout.

Such an assimilation of the Section 8(b)(4) inhibition into Section 8(a)(1) is similar to one which the Board recently approved in its decisions in *Skura (Local 138, Int'l Union of Operating Engineers)* 148 NLRB 679, and *H. B. Roberts*, 148 NLRB 674, which this Court has affirmed. There the specific prohibition of Section 8(a)(4)—upon *employer* discrimination on account of the filing of an employee charge with the Labor Board—was assimilated into the general coercion clause of Section 8(b)(1) when it comes to similar *union* conduct. This Court upheld that Board construction of the statute in *Roberts v. NLRB*, 121 App. D.C. 297, 350 F. 2d 427. Concerning the provision of Section 8(a)(4) which forbids employers to discharge employees for filing charges

under the Act, the Court ruled that while "No such provision was added in 1947" regarding union reprisal, nevertheless "*We think none was required.*" This Court reasoned (p. 428, n. 1) that in view of the broad language of Section 8(b)(1) forbidding unions to "coerce or restrain" employees for exercise of statutory rights, it was unnecessary for Congress "to make specific" as to unions what it had made specific as to employers in Section 8(a)(4).

Similarly, it was unnecessary for Congress in 1947 to make specific as to employer lockouts already barred by the broad prohibition of Section 8(a)(1), what it made specific as to union secondary strikes in Section 8(b)(4). Employers were already forbidden to invoke concerted lockouts. As we demonstrate hereafter, concerted boycotts had long been ruled violative of the Sherman Act both in commerce and labor relations. Moreover, under Sections 8(1) and (3) of the Wagner Act, the Board had already deemed secondary lockouts unlawful (see *supra*, p. 27, n. 6). Indeed, the established nature of the federal prohibition on concerted lockouts was specifically recognized in the Taft-Hartley legislative history. The report of the House Committee on Education and Labor (No. 245 on H.R. 3020, 80th Cong., 1st Sess.) on an early version of the 1947 legislation recommended a bar on "monopolistic strikes"; in that connection the Report stated that "*We [now] have laws to forbid competing employers to conspire together to close their plants . . .*" (Leg. Hist. 315).

Thus the established federal prohibition on secondary lockouts made it unnecessary for Congress to enact a specific counterpart to Section 8(b)(4) which forbade union extension of labor disputes beyond the primary employer. Moreover there was also a special reason why express prohibition *was* required when it came to the union secondary strike which Congress desired to prohibit. In the Norris-LaGuardia Act, and in Section 13 of the Wagner Act protecting the right to strike, there inhered statutory

protection of union strikes which had no counterpart when it came to employer lockouts. Affirmative protection of the right to strike in Section 13, together with the Congressional immunization of union secondary boycotts in the Norris-LaGuardia Act, required Congress expressly to go beyond the general "restrain or coerce" inhibition of Section 8(b)(1) to define in Section 8(b)(4) exactly those union boycotts it deemed necessary of renewed proscription.

We submit that both the text and the history of the Taft-Hartley secondary boycott clause preclude an employer's secondary boycott of the union by a lockout of unionized workers in support of a struck competitor. Any other result creates a wholly incongruous imbalance. While the union which enjoys *general protection* in its right to strike is forbidden to exert strike pressure upon the secondary employer, the secondary employer who can claim *no* statutory lockout immunity would be able to lend support to his struck competitor through a lockout which the Congress in 1947 already deemed prohibited. We believe it axiomatic that Congress could not have intended to secure neutral employers and their workers from involvement in a labor dispute with another employer at the behest of a union while simultaneously permitting the neutral to precipitate such involvement by a lockout in aid of a primary employer struck by the union. Possibly Congress could achieve so incongruous a result if it desired. But until it does so, the policy against achieving an incongruous result in construing federal legislation requires a finding that the Act which forbids the union to boycott the secondary employer equally forbids the secondary employer to boycott the union.

C. *The NLRA Should Be Construed Not to Sanction Employer Boycotts Violating Federal Antitrust Norms.*

The common law and Sherman Act rulings reaching back over fifty years forbid boycotts by which group pressures

are exerted on purveyors of goods or services. Thus when the Wagner Act decreed that the right to strike was not subject to employer restraint or penalty, it was already clearly established that concerted refusal to deal with a buyer or seller of goods or labor, and inducement of other buyers or sellers not to do so, violates federal antitrust law. The construction of the statute now adopted by the Board creates a conflict with antitrust norms which federal agencies are required to heed and protect in their construction and application of regulatory enactments entrusted to their care.¹²

By their "strike against all" lockout compact the employers agreed to a concerted boycott of their unionized employees. When the strike occurred they joined in a concerted boycott by withholding work and pay from their unionized employees. What the Labor Board thus finds permissible under the statute is an undisguised concerted boycott between competing employers in separate bargaining units. This statutory construction would have the NLRA sanction a concerted shutdown by competing employers which the Sherman Act has long been deemed to forbid.

(1) Concerted Competitors' Boycotts in Trade and Labor Relations Violate Federal Antitrust Prohibitions.

¹² Congress was fully aware that in enacting Section 8(b)(4) it was incorporating antitrust prohibitions within the framework of the National Labor Relations Act. Thus the Senate Committee Report (see Legislative History, p. 428) specifically pointed to the *Allen Bradley* case, stating that the new Section 8(b)(4)

"makes it an unfair labor practice for a union to engage in the type of secondary boycott that has been conducted in New York City by local No. 3 of the IBEW, whereby electricians have refused to install electrical products of manufacturers employing electricians who are members of some labor organization other than local No. 3. (See testimony of R. S. Edwards, vol. 1, p. 176 et seq.; *Allen Bradley Co. v. Local Union No. 3, I.B.E.W.*, 325 U.S. 797.)."

The direct relationship between the secondary boycott section and previous antitrust law was elsewhere recognized in the Legislative History. See, e.g., Legislative History, pp. 1104-5, 1106.

The landmark decision incorporating the common law of boycotts into the federal antitrust statutes was the 1914 ruling in *Eastern States Retail Lumber Association v. United States*, 234 U.S. 600 (see also *Lawlor v. Loewe*, 235 U.S. 522, 534). There a system for blacklisting of offending wholesalers, which operated among many retailers, was defended as consistent with the Sherman Act's "rule of reason". Citing its earlier decisions, including *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, the Supreme Court found the common law's boycott prohibition embedded in the Sherman Act's proscription of conspiracies in trade or commerce because "An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy . . ." (234 U.S. at 614). Numerous Supreme Court rulings following *Eastern States Lumber* affirm the *per se* illegality under the antitrust statutes of boycotts affecting commerce. That such boycotts are absolutely prohibited is settled by a line of Supreme Court authorities culminating in *Klor's Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 212-213, where the Court unequivocally ruled concerted boycotts inherently unlawful:¹²

"Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the [per se] forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they 'fixed or regulated prices, parcelled out or limited production, or brought about a deterioration

¹² See, also *Binderup v. Pathé Exchange*, 263 U.S. 291; *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30; *Fashion Originators Guild v. F.T.C.*, 312 U.S. 457; *Associated Press v. United States*, 326 U.S. 11; *Radiant Burners v. Peoples Gas Co.*, 364 U.S. 656. Cf. *F.T.C. v. Beech-Nut Co.*, 257 U.S. 441; *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 723; *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5.

in quality.' *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U.S. 457, 466, 467-468. Cf. *United States v. Trenton Potteries Co.*, 273 U.S. 392. Even when they operated to lower prices or temporarily to stimulate competition they were banned. For, as this Court said in *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 213, 'such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.' Cf. *United States v. Pattern*, 226 U.S. 525, 542.

Since the Sherman Act prohibits conspiracies which restrain the movement not only of goods but also of services, boycotts in labor relations are no less illegal than those in commercial relations. Where two or more employers combine in employee boycott compacts governing hiring, wages, or other employment matters, they violate the Sherman Act. *Anderson v. Shipowners Assn.*, 272 U.S. 359; *Sugar Institute v. United States*, 297 U.S. 553, 587-589; *United States v. Women's Sportswear Assn.*, 336 U.S. 460; *Radovich v. National Football League*, 352 U.S. 455; *Union Circulation Co. v. F.T.C.*, 241 F. 2d 652 (C.A. 2, 1957); *Nichols v. Spencer International Press*, 371 F. 2d 332 (C.A. 7, 1967).¹⁴ This Court, too, has definitively ruled that employment-restricting boycotts violate the Sherman Act. *United States v. American Medical Ass'n*, 72 App. D.C. 12, 110 F. 2d 703, 707-710, cert. denied 310 U.S. 644. Employer boycotts in labor relations are equally banned by the anti-

¹⁴ Most of the judicial decisions prior to 1949 are reviewed in Levy, *Multi-Employer Bargaining and the Anti-Trust Laws* (U.Pa. Press, 1949). It is that commentator's view of the *Shipowners* line of decisions (*id.* at 17), that ". . . employers may combine to fix general principles of employment policies and methods for facilitating the administration of such policies, but may not combine in such a manner that restrictive rules with respect thereto are imposed to fetter the discretion of individual employers . . . this is a situation wherein individuals may do singly what they are prohibited from doing collectively."

trust laws even when the employers combine with a union in arrangements concerning wages, hours, or other employment matters, which restrict the freedom of choice of their competitors. *United States v. Brims*, 272 U.S. 549; *Local 167 v. United States*, 291 U.S. 293; *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797; *Brotherhood of Carpenters v. United States*, 330 U.S. 395; *United States v. Women's Sportswear Assn.*, 336 U.S. 460; *United States v. Employing Plasterers Assn.*, 347 U.S. 186, 190; *Mine Workers v. Pennington*, 381 U.S. 657.

Prior to Congressional enactment of the labor antitrust exemption even *unions* were held to violate the Sherman Act where they involved one employer in the union's dispute with another over wages and hours issues. *Loewe v. Lawlor*, 208 U.S. 274; *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418; *Duplex Printing Press Co. v. Deering*, 254 U.S. 443; *Bedford Cut Stone Co. v. Journeyman Stone Cutters Assn.*, 274 U.S. 37. When it comes to unions, these early Supreme Court rulings holding union boycotts violative of the Sherman Act have been largely repudiated by the Clayton-Norris-LaGuardia "labor exemption." But that exemption affords no haven for *employer* boycotts, since it grants antitrust exemption exclusively to unions acting without collusion with employers.

The history of the labor antitrust exemption has been often reviewed by the Supreme Court and requires only brief summary here. See *United States v. Hutcheson*, 312 U.S. 219, 229-232; *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797, 801-807; *Woodwork Manufacturers v. NLRB*, 386 U.S. 612, 620-626, 629-644. In *Danbury Hatters* (*Loewe v. Lawlor*, 208 U.S. 274) labor union conduct pressuring a unionized employer to withhold purchasing from non-union manufacturers was ruled to be a "secondary boycott" interdicted by the Sherman Act because it resulted in "suppression of competition in the market by methods which were deemed analogous to those found to be

violations in the non-labor cases.”¹⁵ And in the *Gompers* case (221 U.S. 418) the Sherman Act was extended even to a union’s primary boycott against an offending employer. In 1914 Congress reacted to these and similar cases which had sanctioned broad application of anti-trust restraints to union organizing and wage-enhancement efforts.¹⁶ Section 20 of the Clayton Act “withdrew from the general interdict of the Sherman Law specifically enumerated practices of labor unions . . .”¹⁷ However, in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 and *Bedford Cut Stone Co. v. Journeyman Stone Cutters Assn.*, 274 U.S. 37, the Supreme Court sharply restricted the Clayton Act exemption; it held that the statute immunized only “trade union activities directed against an employer by his own employees”¹⁸ rather than “secondary” union pressure upon purchasers from non-union or wage-cutting manufacturers. In 1932 Congress again responded. In the Norris-LaGuardia Act it sought to free labor unions from antitrust inhibitions “in the same manner the Congress intended when it enacted the Clayton Act” (H. Rep. No. 669, 72d Cong., 1st Sess., p. 3), and established “that the allowable area of union activity was not to be restricted, as it had been in the *Duplex* case, to an immediate employer-employee relation.”¹⁹ The Norris-LaGuardia labor anti-trust exemption was applied and even extended by the Supreme Court in its *Apex* (310 U.S. 469) and *Hutcheson* (312 U.S. 219) rulings, which generally freed union secondary boycotts from antitrust restraints. Thus they remained until 1947 when Congress in Section 8(b)(4) of Taft-Hartley forbade most labor union “secondary boy-

¹⁵ *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 506.

¹⁶ See Laidler, *Boycotts and the Labor Struggle* (1913).

¹⁷ *United States v. Hutcheson*, 312 U.S. 219, 230.

¹⁸ *Ibid.*

¹⁹ *Id.* at 231.

cotts" and thus "returned to the regime of *Duplex Printing Press Co.* and *Bedford Cut Stone Co.*"²⁰

For present purposes the significant fact is that the Clayton-Norris-LaGuardia labor antitrust exemption applies exclusively to labor, not management. The Supreme Court has emphasized that the purpose of the exemption—which has undergone successive Congressional re-definitions in 1914, 1932, 1947, (and most recently in 1959 in the new provisions of Section 8(e))—was exclusively to bar the application of antitrust restraints to certain labor union activities. As the Court stated concerning the Clayton exemption in *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. at 803 (and see *United States v. Employing Plasterers Assn.*, 347 U.S. 186, 190): "there is no record indication in anything that was said or done in its passage which indicates that those engaged in business could escape its or the Sherman Act's prohibitions" by obtaining help from labor unions which enjoy antitrust immunity. And in *Hunt v. Crumboch*, 325 U.S. 821, 824, the Court sharply contrasted the antitrust limits on business with the exemption enjoyed by unions:

"Had a group of petitioner's business competitors conspired and combined to suppress petitioner's business by refusing to sell goods and services to it, such a combination would have violated the Sherman Act. *Binderup v. Pathe Exchange*, 263 U.S. 291, 312; *Fashion Originators Guild v. Federal Trade Commission*, 312 U.S. 457. A labor union which aided and abetted such a group would have been equally guilty. *Allen Bradley Co. v. Local Union No. 3*. The only combination here, however, was one of workers alone and what they refused to sell petitioner was their labor.

"It is not a violation of the Sherman Act for laborers in combination to refuse to work. They can sell or not sell their labor as they please, and upon such

²⁰ *Woodwork Manufacturers v. NLRB*, 386 U.S. 612, 632.

terms and conditions as they choose, without infringing the Antitrust laws. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 502, 503. A worker is privileged under congressional enactments, acting either alone or in concert with his fellow workers, to associate or to decline to associate with other workers, to accept, refuse to accept, or to terminate a relationship of employment, and his labor is not to be treated as 'a commodity or article of commerce'." ²¹

If any doubt remained after these rulings that employers are not immunized by the labor exemption in efforts to control their competitors' wages, it was recently dispelled by the Supreme Court in *Mine Workers v. Pennington*, 381 U.S. 657. The Court's opinion repeatedly emphasizes that while the labor exemption applies where a union engages alone in efforts to eliminate wage competition, the exemption is lost even to the union if it joins in arrangements whereby one employer seeks to affect the wages payable by another employer in a separate bargaining unit. As Professor Cox has noted (*Labor and the Antitrust Laws*,

²¹ The contention that the labor exemption immunizes arrangements between competing employers concerning employment matters was rejected by the Seventh Circuit's ruling in *Nichols v. Spencer International Press, Inc.*, 371 F. 2d 332. Answering the claim that Section 6 of the Clayton Act frees employers to enter into agreements restraining the hiring of each other's former employees, the Court stated (at pp. 335-36):

"The readily apparent purpose of this section is to permit the existence of labor and certain other mutual help organizations without being deemed combinations or conspiracies in restraint of trade. Except that the first sentence indicates that an agreement restraining freedom with respect to employment of labor is not, as such, a violation of the antitrust laws, § 6 has no application to the situation before us

"Granting that the antitrust laws were not enacted for the purpose of preserving freedom in the labor market, nor of regulating employment practices as such, nevertheless it seems clear that agreements among supposed competitors not to employ each other's employees not only restrict freedom to enter into employment relationships, but may also, depending upon the circumstances, impair full and free competition in the supply of a service or commodity to the public."

46 B. U.L. Rev. 317, 322), following *Pennington* employers invite "considerable embarrassment" if they "take the initiative in agreeing to maintain a common wage scale . . ."

The impact of the "labor exemption" upon competitors' restrictive agreements governing their labor policies has recently been examined in a Government brief to the United States Supreme Court signed, among others, by the General Counsel of the National Labor Relations Board. In the *Brief for the United States as Amicus Curiae* in No. 240, October Term, 1964 (*Jewel Tea*), it was represented (pp. 25-26, n. 5) that notwithstanding the Clayton Act exemption "at some point a performance by a human being becomes a trade or business . . . Joint 'employer' bargaining as to what are ostensibly 'wages' in such cases becomes buyer-price-fixing. A concerted employer 'lock-out' becomes a commercial boycott . . ."

In sum, nothing in the labor antitrust exemption frees employers to engage in concerted boycott arrangements with respect to matters of wages, hours, and employment. Since employers have no claim to the labor exemption, there can be no doubt that the concerted lockout by the intervenors herein violated the antitrust laws. An agreement between competing employers in separate bargaining units fixing hiring policies, working hours, wages or other incidents of employment, violates the antitrust statutes even in the absence of any boycott to enforce the compact.²² And certainly where the agreement is also sought to be secured and enforced by a boycott of employees, the authorities make quite clear that the Sherman Act is infringed. *Anderson v. Shipowners Assn.*, 272 U.S. 359; *Radovich v. National Football League*, 352 U.S. 445; *Union Circulation Co. v. F.T.C.*, 241 F.2d 652 (C.A. 2, 1957); cf. *American Medical Assn. v. United States*, 317 U.S. 519, 535. Con-

²² Such wage-fixing or employment-restricting agreements, *Pennington* makes clear, violate the law because an employer has no protected right to control or restrict his competitor's wages any more than to fix prices.

cerning boycotts against employees to restrict their hiring or employment, this Court stated and applied the governing principle in *United States v. American Medical Ass'n.*, 72 App. D.C. 12, 110 F. 2d 703, 713, cert. denied, 310 U.S. 644:

"Congress undoubtedly legislated on the common law principle that every person has individually, and that the public has collectively, a right to require the course of all legitimate occupations in the District of Columbia to be free from unreasonable obstructions; and likewise in recognition of the fact that all trades, businesses and professions, which prevent idleness and exercise men in labor and employment for the benefit of themselves and their families and for the increase of their substance, are desirable in the public good and any undue restraint upon them is wrong and is immediate and unreasonable and, therefore, within the purview of the Sherman Act."

Indeed, beyond the concerted boycott and wage fixing ingredients of the Big Six lockout the *ultimate confessed purpose* of the whole Association arrangement—to affect product prices and restrict allegedly excessive competition between the employers—presents a classical antitrust violation. If there is one thing which the Supreme Court has repeatedly emphasized in the area of labor antitrust, it is that antitrust laws are violated where employer wage-fixing is used as a means for restricting or controlling product price and competition. That, after all, is the very holding of the *Pennington* case, and it was equally the thrust of the Court's earlier rulings in *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493, 501, 512-513, and in *United States v. Women's Sportswear Assn.*, 336 U.S. 460. Cf. *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797. The objective of the Big Six Association in its formation was precisely the forbidden goal of reducing price and product competition in the

market place. As explained in the testimony of Wyatt, founder of the Association (J.A. 177), it was the governing purpose by reducing alleged excessive competition between the lumber companies to "*make the product more competitive with substitute materials in the market place.*" That objective, Wyatt made clear, was to be achieved by making the situation less competitive as between the competing lumber companies. Thus Wyatt testified that at the very beginning he explained the objective in the formation of the Association to the other employers in the following terms (J.A. 357; cf. 15-16) :

"... [separate bargaining] wasn't the answer for what we saw ahead and until we could take those competitors who were knocking each other over on the head in the market place and doing everything possible to gain competitive advantage, and bidding against each other for timber, as well as for the customers, until they all felt that a move on their part in a constructive direction would be matched at the same time by the move of the other members, it was always going to be 'I won't move until the other guy does'"

From every point of view—competitor wage-fixing, concerted boycott, industry competition elimination—in its making and execution the "strike against all" lockout compact violated the antitrust laws.

(2) *The N.L.R.A. Should Not Be Construed to Sanction Actions Which Offend Antitrust Norms.*

It is clear, we submit, that boycott arrangements among separate unit employers, such as the Big Six "strike against all" lockout, violate antitrust inhibitions. That consideration invokes the established rule that federal regulatory enactments be construed so as to avoid conflict with the Sherman Act. To avoid harsh conflict with antitrust prin-

ciples the National Labor Relations Act should be read to prohibit concerted lockouts by which unionized employees are penalized because their union has struck a competing employer.

It is an accepted principle in the construction of federal regulatory statutes that courts should, if at all possible, interpret their provisions in consonance rather than in conflict with federal antitrust norms. *Nat. Broadcasting Co. v. United States*, 319 U.S. 190, 222-224; *McLean Trucking Co. v. United States*, 321 U.S. 67, 80. This Court applied that principle in *Isbrandtsen Co. v. United States*, 93 App. D.C. 293, 211 F.2d 51, cert. den. 347 U.S. 990 (cf. *Pittsburgh v. F.P.C.*, 99 App. D.C. 113, 237 F.2d 741, 754). There the Maritime Board had shortcut the prescribed regulatory procedure in a manner which prevented assured infusion of antitrust norms into the regulatory scheme. As this Court stated (211 F.2d at 57) in returning the case to the Board, where agency action approves conduct "which would otherwise be illegal under the anti-trust laws,"²² the agency must "*make sure that the conduct thus legalized does not invade the prohibitions of the anti-trust laws any more than is necessary to serve the purposes of the regulatory statute.*" When the Maritime Board ad-

²² In most regulatory areas the governing statute itself explicates the antitrust immunity resulting from agency regulation or approval of private conduct. While the National Labor Relations Act does not itself contain a provision to that effect, under the Clayton-Norris-LaGuardia exemption the conduct which the NLRA sanctions in labor relations is deemed immunized from antitrust inhibitions. As the Supreme Court recently made clear in *Pennington* and in *Jewel Tea* (381 U.S. 676), the labor antitrust exemption of Norris-LaGuardia and the Clayton Act is to be construed in consonance with the National Labor Relations Act's definitions of collective bargaining authority. In *Jewel Tea* the Court applied the consonance principle and found that a union-employer agreement on hours of labor and operation was within the legitimate ambit of union bargaining authority under Section 8(a)(5) of the NLRA, and therefore enjoyed the protection of the labor exemption from Sherman Act prohibitions. Cf. *Putnam v. Air Transport Assn.*, 112 F. Supp. 885, 887 (S.D.N.Y., 1953). See also *United States v. E. I. duPont & Co.*, 351 U.S. 377, 388-89, n. 14.

hered to its position following this Court's *Isbrandtsen* remand, this Court reversed (99 App. D.C. 312, 239 F. 2d 933), and was affirmed by the Supreme Court, which found that the Board had inadequately heeded antitrust strictures in the construction of the regulatory statute. *Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481.

As we have demonstrated above, it was established long before the Wagner Act that concerted employer boycotts violate the Sherman Act. A reading of the National Labor Relations Act which permits concerted employer lockout action so clearly and so long forbidden by the antitrust laws violates the *Isbrandtsen* rule. Only the most clearly stated Congressional intention—and none whatever exists here—would warrant a statutory construction creating conflict between the Sherman Act and the National Labor Relations Act. Indeed, in determining the scope of the National Labor Relations Act's inhibition on employer boycotts, disregard of the antitrust history and precedents would contravene a recent Supreme Court stricture. In *Woodwork Manufacturers v. NLRB*, 386 U.S. 612, the Court rejected a literal interpretation of Section 8(b)(4) which would have outlawed a secondary union's strike against the primary employer. The principal basis for the Court's refusal of literalism was the legislative history and particularly the antitrust history of Section 8(b)(4). The *Woodwork Manufacturers* principle favoring a consonant reading of antitrust law and the NLRA secondary boycott ban is applicable here. It repels a construction of Taft-Hartley which would prohibit the union from boycotting the neutral employer but leave the neutral employer free to invoke pursuant to concerted lockout compact a secondary boycott of the union and its members.

Conclusion to Point I

We have set forth above the salient arguments demonstrating the invalidity of a concerted lockout pursuant to

pre-arrangement between employers in separate bargaining units. We believe the analysis underscores the total implausibility of the Board's view (already rejected by this Court) that *American Ship* alone validates concerted competitors' lockouts. Since in *American Ship* no multi-employer lockout was involved, the issue there resolved by the Court was vastly different from the question here. There was no occasion to decide whether under Sections 8(a)(1) and (3) of the statute, employees of a "neutral" employer may be harassed by a shutdown because their union has struck another employer. Nothing in *American Ship* invoked the imbalanced and incongruous result the Board approves here—that the neutral employer whom Congress has forbidden the union to involve by a strike in its dispute with another employer may renounce his neutrality and lock out his employees in support of a struck competitor. Nor did *American Ship* invoke the consideration, presented by a concerted lockout compact, that the National Labor Relations Act should be read in consonance with antitrust norms—a consideration enhanced in importance since the Supreme Court in *Pennington* (only weeks after *American Ship*) interdicted efforts by an employer to control wages paid by his competitor.²⁴

Instead of answering or deigning even to note the weighty arguments against the validity of a concerted lockout by employers in separate bargaining units, the Board blithely

²⁴ It is worthy of note, too, that the Board's expansive interpretation of *American Ship* would ascribe to that Supreme Court decision a *sub silentio* extinction of the entire *Buffalo Linen* doctrine, to which the Court in *American Ship* expressly pointed as another "distinct class of cases". 380 U.S. 300, 307. Nor could the extinction of *Buffalo Linen* be regarded as some matter of minor consequence. That rule is based on the *quid pro quo* that a union subjects itself to a possible concerted lockout by competing employers where it has freely opted for the countervailing benefits of a genuine multi-employer unit arrangement. To say now, as the Board does in its expansive reading of *American Ship*, that even without union agreement to a merged bargaining unit it may be penalized by concerted shutdown if it strikes a single employer, is to imply a major shift in the balance of union-employer bargaining options through

repeats the *American Ship* rationalization tendered in its first decision: that a bargaining impasse existed in the Association-union negotiations, which authorized the invocation of a lockout as a bargaining device by any single employer in his own economic interest. We will not repeat the extensive showing in our first brief—which this Court's 1966 opinion has accepted—that a lockout invoked exclusively pursuant to a compact *obligation* to support any competitor who is struck cannot be rationalized later on a different *permissive* ground suggested by the intervening Supreme Court ruling in *American Ship*. The employers' recent confession that there would have been *no* lockout in the absence of the “strike against all” compact requiring it (see *supra*, p. 3) now makes the point incontestable. But we do pause to note that apart from the Board's substitution of apples (permissive individual impasse lockouts) for oranges (concerted solidarity lockouts by binding compact), its impasse-lockout rationalization is also faulty for two additionally conclusive reasons. First, the alleged “economic interest” goal among the six employers—achieving a uniform wage-hour settlement—is itself (in the absence of a *Buffalo Linen* merger) an unlawful one which cannot validate their concerted boycott; second, any bargaining “impasse” here was itself the result of the employers' unlawful “strike against all” compact.

(1) Of course competing employers do have an economic interest in preventing wage-hour differentials affecting their product prices, but any agreement for that purpose violates established antitrust inhibitions. Under the Sherman Act common economic interest of the participants in a boycott has never served to justify “ganging up” on an

a *sub silentio* extinction of *Buffalo Linen*. So radical a result, we submit, can hardly be ascribed to the limited Supreme Court decision in *American Ship* governing exclusively the option of a single employer, not acting in concert with competitors, to affect his own bargaining relationship with the union because an impasse has arisen.

individual supplier of goods or services. See *supra*, p. 37. Moreover, "economic interest" can no more protect a secondary lockout than the economic interest of a union validates its secondary boycott. Indeed, it is hard to imagine *any* concerted boycott, whether in labor relations or in product competition, which is not motivated by a unity of economic interest among the participants. The Board's easy substitution of the economic interest underlying concerted boycott arrangements such as the intervenors' "strike against all" compact for the economic interest underlying an individual employer bargaining lockout simply refuses to face up to the clear Congressional prohibition on boycotts in trade and labor relations. It elevates to controlling force the "economic interest" of an employer in his competitor's wage agreement which interest the Supreme Court in *Pennington* found to be one *not* protected by our national labor policy (see *supra*, p. 29).

(2) The Board is also in error in its insistence that in view of *American Ship* an "impasse" in bargaining validated the lockout here in issue. Apart from the consideration that impasse did not cause this lockout required by a "strike against all" compact, the fact is that any bargaining impasse here was *itself the tainted product of the unlawful lockout compact*. A "strike against all" compact is, after all, a *guarantee* of individual employer bargaining intransigence with impunity. No one can say that, but for the pre-agreement to a lockout by which all would come to the aid of any struck employer, each of the six employers would in fact have been at impasse on June 5, 1963 and remained so during the lockout period. An impasse arises when the bargaining parties have deadlocked in efforts to achieve agreement, and surely each party's willingness to alter his offered terms to seek an agreement is affected by his anticipations, including his anticipation of the effect of failure to agree concerning the potential ef-

feffectiveness of a strike against him. Thus, the willingness of every one of the six companies in the Association to make bargaining concessions prior to the lockout was materially affected by its knowledge that in the event of a negotiating deadlock and a resulting strike it would have the support of a concerted lockout. Any impasse which may have existed before the lockout and any impasse which may have continued during the lockout period was clearly the *product of the concerted lockout arrangement* by which each employer's bargaining intransigence was given material sustenance. To validate the lockout because of an impasse itself fostered by the unlawful lockout compact is the classical error of circular reasoning.

• • • • •

We submit that this Court's original rejection of the *American Ship* rationale was correct and must stand. No matter how respectfully the Board states its disagreement with this Court, its position finds no support in law or logic and certainly none in the *American Ship* decision. Nor, as we demonstrate in the remainder of the Argument, is there any basis for approving the Board's belated recourse to a *Buffalo Linen* rationalization.

II

The Big Six Lockout Was Not Privileged Under Buffalo Linen Because There Was Neither Individual Employer Surrender of Bargaining Authority Nor the Indispensable Union Agreement to Creation of a Multi-Employer Bargaining Unit.

In addition to the Board's reaffirmation of the *American Ship* rationale, its Supplemental Decision and Order makes an eleventh-hour effort at an alternative validation of the lockout under *Buffalo Linen*. This afterthought, however,

has the aura of unreality. The Board's reading of *American Ship* would, after all, validate concerted lockouts even in the absence of a *Buffalo Linen* unit merger agreed to by the union. Since in the Board's view the *Buffalo Linen* doctrine has lost any real significance, it is not surprising that the Board now purports to find employer solidarity and union acceptance of a multi-employer unit under circumstances unprecedented in its previous *Buffalo Linen* adjudications. While giving lip service to the requirements of employer bargaining solidarity and union acceptance of a merged bargaining unit, for all practical purposes the Board's decision eliminates both requirements.

A. The Big Six Association Lacked the Individual Employer Surrender of Bargaining Authority Required Under Buffalo Linen.

Where a concerted lockout is defended before the Board on the ground of necessity to protect the "integrity" of a multi-employer bargaining unit, a finding of employer solidarity—of the "binding" quality of the employers' association—is a primary ingredient. For it is axiomatic that a concerted competitors' lockout cannot be justified as protecting the "unity" of a multi-employer unit if it lacks the "unity" alleged to require protection.²⁵ As the Board recently stated the guiding rule:²⁶

²⁵ The authorities hold that the creation of an employer bargaining association does *not* result in the creation of a multi-employer bargaining unit if the delegation of the bargaining power to the association is merely supplemental to reserved individual-employer power to bargain or settle (see *The Kroger Co.*, 158 NLRB 569, affirmed, 117 App. D.C. 336, 330 F. 2d 210 and cases cited), or if the delegation of bargaining authority is revocable at will (see *Indiana Limestone Company, Inc.*, 136 NLRB 697), or if in other ways what gives the appearance of a multi-employer unit is merely a format for group bargaining by individual employers acting in their own interests (see *Bennett Stone Company*, 139 NLRB 1422).

²⁶ Brief in Circuit Court for NLRB (p. 9) in *NLRB v. David Friedland Painting Co.*, *supra*, p. 28.

"It is settled law that membership in a multiemployer unit must be based upon its essential character as a 'purely consensual device' on the part of all the parties concerned . . . The reason for this requirement is plain. Multiemployer bargaining consists of mutual union-employer commitment to merge, for collective bargaining purposes, the employer's separate units into a common unit, which would constitute an appropriate bargaining unit. Central to this commitment to a common unit is an undertaking to be bound thereafter on a group rather than an individual basis. This mutual commitment to merge the several employers' units has manifold consequences. Rights and obligations arise which did not exist before."

The evidence introduced before the Board addressed to the question of the solidarity of the Big Six Association (*supra*, pp. 4 to 7) demonstrates 1) that the Association—successor to previous loose and voluntary bargaining associations in the Western lumber industry—was hastily and belatedly formed in April of 1963 after bargaining between the companies and the unions had actually commenced by the making of individual-employer "openings" (J.A. 20); 2) that at least three key contract subjects were excluded from the Association's bargaining power; 3) that in derogation of the necessary irrevocable and complete delegation of individual bargaining power, U.S. Plywood throughout the pre-lockout negotiations insisted on continuing individual bargaining over hours of work and overtime, and threatened to withdraw from the Association if precluded from such individual bargaining; 4) that each of the individual-employer invitations to the unions to commence bargaining asked them to negotiate with the Association "and this Company"; 5) that at every bargaining session each of the six employers' individual negotiators partici-

pated (J.A. 404-405); 6) that the original draft Association Agreement calling for the members' decision by a majority vote was changed in the final version to a 75% vote—which in testimony by Wyatt in August 1963 was conceded to have been a *veto* for any single employer²⁷; 7) and that the same Agreement had been altered from its earlier draft version by elimination of references to Association power "*binding on all companies*", elimination of the description of the Association as one in which "*the companies shall bargain as a unit,*" and addition of "*voluntary*" to the de-

²⁷ Since LSW had no contracts with Rayonier (J.A. 587), on its face the 75% rule meant for LSW that a single company could veto a settlement desired by the other four if it could merely win Rayonier's abstention. While Wyatt testified before the Board (J.A. 439 et seq.) that the rule would not operate in that fashion because in the case of LSW Rayonier was excluded and only 75% of five members would be required, the fact is that Rayonier did actually participate in at least one vote involving contract offers to LSW, on June 3, 1963 (R. 368, p. 16). Moreover, in a hearing held prior to the Board hearing in this case, Wyatt conceded under oath that a single employer *could* veto any settlement. Wyatt testified in a California Unemployment Insurance Appeals Board hearing on August 26 and 27, 1963. In that testimony (G.C. 42, pp. 85-86), referring to a conversation of June 3d, Wyatt stated:

". . . I indicated certain confusion and there certainly was, with respect to a number of positions, a number of issues before us, a number of points of difference, a threatened strike and the fact, as I mentioned it, that if a partial strike took place the rest of the companies would shut down, were bound to shut down. Now, in connection with many of these issues and much of this confusion, in response to a question I replied that one member, the way the association was constituted, could prevent any given action on the part of the association as such on collective bargaining action."

Wyatt repeated this admission at pp. 137-138 of the California hearing:

Q. Then did I not ask you, 'And are you certain that each company is bound to this agreement?' and did you not respond to me that any one company may abrogate the agreement?

A. I did not, Dan, not with respect to the lockout, not with respect to the lockout.

Q. With respect to what then?

A. Almost anything else in the association, any action, any action to make an offer, not to make an offer, to be down a point, to do almost anything an association does in the normal conduct of collective bargaining . . ." (emphasis supplied).

scription of the Association. An overwhelming case was thus made that the Association was but a device for simultaneous group negotiations with individual employer authority reserved in numerous ways, rather than a body with fully delegated and irrevocable power to settle contract terms binding on its members.

In finding that the six employers had sufficiently surrendered their individual bargaining authority in their Association Agreement, the Board evades the voluminous showing to the contrary, and chooses instead to rely on self-serving recitals in the employers' Association Agreement. In response to one of petitioners' points the Board does proffer the suggestion that the word "voluntary" was inserted by the employers in their designation of the Association as a mere description signifying the consensual nature of the entity. Yet even this wholly speculative rejection of the obvious implication of the term "voluntary"—as designating a non-binding arrangement of convenience for group bargaining—distorts the undisputed facts of record. For the addition of "voluntary" was not the only change in the final version from the earlier drafts of the Association Agreement. There were excised from the final text a provision stipulating Association power "*binding on all companies*" and a clause stipulating that within the Association the companies "*shall bargain as a unit*". It was contemporaneous with the removal of these express provisions signifying creation of a true multi-employer unit that "voluntary" was added to the designation of the Association. In that context the Board's summary dismissal of "voluntary" on semantic grounds, without even a nod to the telling excisions from the Association charter, does not meet acceptable standards of agency explication.

Similarly inadequate is the Board's disposition of the objection that the 75% veto rule within the Association was actually a veto for any *single* employer, and therefore deprived the Association of the power to bind individual

employers which is necessary for the creation of a multi-employer unit.²⁸ In so doing the Board simply disregards a judicial admission by Wyatt, the leading light of the Association, that any *single* company could veto a settlement. Wyatt testified under oath in a California hearing on August 26, 1963 that "*one member, the way the association was constituted, could prevent any given action on the part of the association as such on collective bargaining action*" (*supra*, n. 27). Certainly this sworn and contemporaneous admission by the architect of the Association was material, if not conclusive, but the Board gave it not even a nod in making its contrary finding.

Finally, in its disposition of the employer "solidarity" issue the Board recites (*infra*, p. 3a) that ultimately the agreement with the unions was "in fact, signed by Wyatt for the Association on behalf of all its members". But that agreement was signed in August of 1963 long *after* the unions had filed unfair labor practice charges in this case. It was the plainest error for the Board to rely on the employers' *post litem motam* act of having their contracts signed by Wyatt alone when their "unity" was already a key issue in litigation.

B. *The Unions Did Not Agree to a Multi-Employer Bargaining Unit.*

The historical pattern in the Western lumber industry has been one of union bargaining for individual-employer

²⁸ In response to petitioners' objection that the 75% requirement was actually an individual employer veto rule the Board makes the following cryptic response: "Nor do we consider the fully bound nature of the Association to be impaired by the provision in the organic agreement that issues were to be resolved by a 75 percent vote. That provision was reasonably explained by Weyerhaeuser's size vis-a-vis that of its fellow members and the fact that each Company had only one vote, regardless of size. And, although certain of the testimony leaves it unclear as to the number of negative votes necessary to 'veto' a proposal, it is quite clear that at least two negative votes were required" (*infra*, p. 4a). What makes it "quite clear" to the Board that a single employer could not veto under the 75% rule is nowhere explained.

units certified by the National Labor Relations Board. Traditionally, the employers have participated in negotiations through loosely-joined employer associations making no pretense of irrevocable or exclusive authority to bind any employer. With no prior history of multi-employer unit bargaining, it was requisite for invocation of *Buffalo Linen* that the unions agree to any merger of existing separate bargaining units.

It is also undisputed that the Big Six never actually disclosed to the unions their Association Agreement and that neither union ever expressly accepted or recognized a multi-employer unit. Accordingly, any finding of union acceptance of a merged bargaining unit is necessarily derived from mere inference based on the unions' willingness to meet with the Association representative on substantive contract issues during the few weeks prior to the lockout. We set forth below (see also, *supra*, pp. 7 to 12) the relevant facts bearing upon the view that the unions gave *de facto* recognition to a multi-employer unit:

(i) *The IWA Negotiations.* Wyatt's representations to the IWA in the spring of 1963 concerning the nature, structure, and purpose of the Big Six Association were characterized by the desire to reveal as little as possible of any intention to achieve a multi-employer unit. Wyatt correctly appreciated that IWA would not be agreeable to a lockout-validating multi-employer unit. For that reason, Wyatt did not inform the IWA of the existence or content of the Association Agreement, of the minority veto rule within the Association, or of the employers' compact to support each other by a concerted lockout in the event of a strike. Moreover, the formal letter by each of the Big Six employers to the IWA inviting it to meet with "*the Association and this Company*", and representations in subsequent meetings with IWA, scrupulously avoided any reference to a multi-employer bargaining unit.

The single intimation that more than a loose association

was actually in contemplation, was Wyatt's verbal claim in the opening meeting with IWA on April 24, 1963, that the Association could make a "binding" settlement on new contract terms. IWA representative Nelson immediately challenged that claim, upon the ground that U.S. Plywood had opened for individual bargaining the question of hours of labor and overtime—which plainly impugned any exclusive power of the Association to conclude a wage-hour settlement binding on all members. Thereupon there ensued two days of meetings among the employers wherein U.S. Plywood steadfastly refused to surrender to the Association its individual bargaining rights over hours of labor and overtime. Indeed, as Wyatt informed the IWA, U.S. Plywood threatened to withdraw from the Association rather than surrender its individual bargaining authority.

Thus, the single and indirect intimation to IWA that a multi-employer unit was actually in contemplation—Wyatt's verbal claim of Association "binding" authority—was wholly discredited and never revived prior to the lockout. The individual bargaining insisted upon by one of the giants of the Big Six, and its threat to withdraw from the Association, negated Wyatt's verbal claim of Association "binding" power; for it was axiomatic that if members could bargain unilaterally and withdraw at will, the Association lacked the primary ingredient of a multi-employer unit. The combination of facts suppressed from and made known to IWA *all* manifested the lack rather than the existence of Association authority to bind its members.

ii. *The LSW Negotiations.* When it comes to the LSW negotiations, Wyatt played a quite different hand from the meetings with the IWA. Knowing of LSW's affirmative interest in the benefits and the protections of a multi-employer contract, Wyatt sought to make just enough revelations of "solidarity" to convince LSW that such might result. He conceded the existence of an actual Association Agreement, though refusing to show it. He affirmed the

existence of a decision by the Big Six to a lockout in response to any selective strike, by which he manifested his intention to claim the principal legal benefit of a multi-employer unit. Thus Wyatt sought to assure LSW of its desired protection from rival-union raids at particular locations.

LSW, however, was not ready to acquiesce in any incomplete and nebulous arrangement, thereby possibly subjecting itself to a *Buffalo Linen* lockout in the event of a strike without corresponding benefits from acquiescence (see J.A. 573-574). Accordingly, it declined to recognize the Association unless and until certain assurances were made to it: 1) the guarantee of a single master agreement resulting from the negotiations, 2) the inclusion of employer units east of the Cascades, and 3) inclusion of three excluded major bargaining subjects. In the first meeting between LSW and the Big Six, on May 9, 1963, after preliminary exploration of the scope, structure, and intention of the new Association format, LSW remained adamant that it would not recognize the Association unless and until further satisfactory arrangements and guarantees were made (see *infra*, p. 60, n. 29). With that understanding, LSW and the Big Six commenced discussion of substantive terms. No further reference to the recognition issue was made during the ensuing four weeks of unsuccessful negotiations preceding the lockout. As in the case of IWA, the record wholly fails to show a meeting of minds, since no express offer of a multi-employer unit was made and no acceptance thereof is anywhere disclosed by the record.

The Board's finding of union consent to a multi-employer unit is wholly unjustified on such a record. In previous *Buffalo Linen* cases the Board insisted upon a clear act of union acceptance to effect a merger of separate employer bargaining units unless the employers had engaged in many successive years of joint bargaining. In this case no such previous history supports the Board's

finding of union agreement to a multi-employer unit, because only a few scant weeks of "bargaining" with the new Association preceded the lockout itself. Moreover, the record is replete with union reservations and protestations, prior even to the discussion of economic issues, concerning the nature and scope of the new Association. Then too, the Board can point to no single instance where the companies ever expressly referred to the creation of a multi-employer unit as such, or requested union agreement thereto. The Board's entire approach to the issue of union consent is directly undercut by the studied failure of the employers in their formal notices requesting bargaining with the new Association to make *any reference to the formation of a unit*. To the contrary, the agreement sought in the formal individual-employer notices was union agreement to negotiate with the Association "*and this Company*" —a stipulation which on its face negated any request for recognition of a merged multi-employer unit.

In these circumstances the Board's heavy reliance on the unions' mere consent to bargain with the Association (all Companies represented) is quite misplaced.²⁹ The Board's opinion obscures the *critical difference* between forms of

²⁹ The Board's opinion (*infra*, p. 5a) relies most heavily on an extract from page five of the minutes of LSW's secretary Ted Prusia, reflecting willingness expressed by LSW's negotiator Johnston "to recognize you as an association for collective bargaining." But that extract from the minutes cannot fairly be lifted out of the context of the immediately preceding representations and reservations reflected on the same page of Prusia's minutes concerning the exclusion of plants and bargaining issues. Thus, page five of the minutes begins by quoting LSW's representative Hartley as follows: "Now that we have the technical points discussed, let's get down to the issues. We are not going to throw the plants east of the Cascades to the wolves." Thereafter, Hartley states that "we are not going to split our forces," and that "we cannot agree to negotiate for just some of the plants. . . ." LSW's negotiator Johnston states in the summation which concludes page 5 of the minutes that regardless of association efforts to exclude the three operations east of the Cascades, LSW will be "speaking for all our Locals," and would recognize the association if broadened to include union-proffered issues "not only on your issues." Cf. G.C. 60, p. 2. In the light of the entire colloquy between the parties, the Board's reliance on a single sen-

group bargaining where individual-employer bargaining authority is reserved and the true merger of bargaining units into a single multi-employer unit where individual bargaining power has been relinquished. Surely the mere willingness of the unions to negotiate with the Association (individual representatives of each company it should be recalled, participated in all Association bargaining sessions) did not constitute an acceptance of a multi-employer bargaining unit for (1) no such bargaining unit was in terms mentioned or proffered to the unions; (2) the request to the unions was actually to deal with a "voluntary" Association and negatived surrender of individual employer bargaining power by stating that "the Association and this Company will be prepared to meet with you", and (3) what very little was revealed to the unions concerning the Association indicated not a surrender of employer power to a joint representative but rather a tenuous and tentative association for convenience in bargaining, similar to its predecessors in the previous years of negotiations. Surely that was the import to the unions of the exclusion of three critical areas of bargaining from the Association's authority and of Wyatt's admission to IWA, only five weeks before the lockout, that he could not be sure to hold the employers together in the Association.

Like the blessing of a minister necessary to validate a marriage, the consent of the union is, as the Board admits, necessary to the consummation of a marriage of separate employer bargaining units into a multi-employer unit. The gaping flaw in the Board's finding of union consent is that the unions here were never requested to bless anything more than an ambiguous association of convenience. Whether the Association was as between the employers a

tence wrested from the fuller text gives a gratuitous and entirely unwarranted breadth to the carefully reserved and wholly tentative acquiescence of the LSW in commencing negotiations with an association whose scope and character remained undefined and in dispute between the parties.

form of trial marriage or a mere experiment in free love, the fact is that the unions were never told that it was a *marriage*. Under these circumstances there was simply no offer by the employers whose acceptance by the unions could possibly constitute union agreement to formation of a multi-employer bargaining unit.

C. The Employers' Concealment of Material Conditions of Their Association Compact Vitiated Any Union Consent to a Multi-Employer Unit.

Apart from other serious questions presented by the Board's *de facto* or implied acquiescence theory, in the present context that theory raises an issue of general import under the Labor Act: may a union be held to have accepted an association as the binding representative of employers for multi-employer bargaining purposes, where a material ingredient of the Association—minority veto power—is concealed from the union because the employers fear that disclosure will preclude union acquiescence?

In the May 9th opening meeting the LSW asked to see the Association Agreement but was turned away by a mere laugh by Wyatt. The Trial Examiner has found that the request was denied by the employers because they feared that LSW would refuse recognition if it learned, upon reading the Association Agreement, that a minority of two could veto a settlement which a majority was willing to conclude. As the Trial Examiner put it (J.A. 71), Wyatt "might have believed it more in the interest of the aims of the Association—to induce bargaining by LSW—if disclosure of the 75 percent rule were not made. . . ."

The Trial Examiner was certainly correct in anticipating that disclosure of the 75% rule would have precluded the willingness of the unions to commence Association negotiations. Under that rule *at least* five affirmative votes of the six employers, rather than a majority, was required to

reach agreement with the union. In fact there is strong evidence that the five out of six requirement (75%) was actually a six out of six unanimity rule (see *supra*, n. 27). But whichever was the true formula, the undisputed fact is that a minority under the 75% rule could prevent action approved by a majority of the six employers.

The unions were well aware of what they stood to gain and lose by agreeing to multi-employer unit bargaining. Without it they knew from past experience that they could strike less recalcitrant employers and by successive settlements gain concessions from stronger and more reluctant employers such as Weyerhaeuser (see J.A. 15). But with a multi-employer bargaining unit, while subjecting themselves to concerted lockout possibility, they could at least anticipate that the more reluctant employers might be outvoted within the Association on terms for settlement with the union (see Tr. 1766). However, by accepting a multi-employer unit operating on a minority veto rule (two of six votes as the Board would have it or one out of six as we contend), they would have lost the bargaining advantage compensating for surrender of the valued strike weapon. For then a minority of powerful and intransigent employers could enforce their intransigence by vetoing any settlement desired by a majority, with the prior assurance of forcing a concerted lockout if a strike resulted. This, in fact, is what Weyerhaeuser achieved by its intransigence on the principal Weyerhaeuser objective of the seven-day week, which other employers were more willing to abandon (J.A. 131; 274; 422-424; 706-797).

Minority veto in an employer association constitutes a highly material fact whose concealment prevents a finding of union acceptance of such an association. That is the teaching of established contract principles.³⁰ Thus it is

³⁰ The law of waiver, applicable to union acceptance of multi-employer unit bargaining, leads to a like result. A union has a statutory right to insist on bargaining in the Board-designated unit with each employer

established law that concealment or non-disclosure by a contracting party of material facts not known by the other, constitutes fraud or misrepresentation voiding any resulting compact between the parties. The rule, stated in Section 471 of the Restatement of Contracts, is that fraud voiding a contract is effected by "nondisclosure where it is not privileged, by any person intending or expecting thereby to cause a mistake by another to exist or continue, in order to induce the latter to enter into . . . a transaction"; and (Section 472) "there is no privilege of nondisclosure by a party who . . . knows that the other party is acting under a mistake as to undisclosed material facts . . ." ³¹ "A false representation is material if the fact untruly asserted, or wrongfully suppressed if it had been known to the party, influenced his judgment or decision in entering into the contract." *Homelite v. Trywilk Realty Company*, 272 F. 2d 688, 691 (C.A. 4, 1959).

separately, and a multi-employer unit arises only where it has voluntarily waived that statutory right. As this Court recently emphasized in *Von Boeing v. Nitze*, decided October 17, 1967, "A waiver in any kind of a case, is an intentional relinquishment of an existing right." And as this Court stressed in *UAW v. NLRB*, — App. D.C. —, 381 F. 2d 265, 267, cert. den. 88 S.Ct. 82: "The Board has said that a union will not be held to have waived a statutory right unless the waiver is 'clear and unmistakable.'" It seems evident that a waiver is neither intentional nor clear and unmistakable where it is induced by concealment of material facts from the union's knowledge.

³¹ The Restatement of Contracts also states the rule (Section 32) that "*An offer must be so definite in its terms . . . that the promises and performances to be rendered by each party are reasonably certain.*" That rule is not met, for example, when the offer leaves uncertainty of the subject matter to be exchanged for the purchase price. Corbin on Contracts, § 100. A familiar situation invoking that rule is an acceptance of an offer to construct a building where the offer omits any plans or specifications. See e.g., *King Lumber Co. v. National Bank*, 286 F. 906 (C.A. 4, 1923). In such cases, as the Court emphasized in *Greater Service Homebuilders v. Albright*, 88 Colo. 146, 293 P. 345, 349, no binding agreement arises because "whether the house is of one room or one hundred, whether it is built of straw or stone, whether it stands on a lot or section, whether it is located in Denver or Dublin, are mere matters for conjecture." So here, the employers may privately have charted a structure which they asked the unions to "buy"; but since the structure itself was left wholly undefined the offer itself was incomplete and incapable of supporting a contract.

And the duty of disclosure particularly applies where the party has made partial disclosures which may mislead for lack of full disclosure. In *Equitable Co. v. Halsey, Stuart & Co.*, 312 U.S. 410, 425, a case involving misrepresentation in the sale of securities, the Supreme Court held:

"It is the duty of one selling securities, who attempts to supply a prospective purchaser with facts concerning the issue, not only to state truthfully what he actually tells, but also not to suppress any facts within his knowledge which will materially change or alter the effect of the facts actually stated. To tell less than the whole truth may constitute a false and fraudulent representation. A partial and fragmentary disclosure of certain facts . . . accompanied by the willful concealment of material facts which change the effect of the facts actually stated, is as much a fraud as an actual positive misrepresentation."

Quoting with approval (312 U.S. at 425-426) the Restatement of Torts (Section 529) that "A statement in a business transaction which, while stating the truth so far as it goes, the maker knows or believes to be materially misleading because of his failure to state qualifying matter is a fraudulent misrepresentation", the Court emphasized that "a statement of half truth is as much a misrepresentation as if the facts stated were untrue." See also, *McNabb v. Thomas*, 88 App. D.C. 379, 190 F. 2d 608, 609, n. 1, cert. denied 342 U.S. 859; *Globe Steel Abrasive Co. v. National Metal Co.*, 101 F. 2d 489, 491 (C.A. 6, 1939); *Homelite v. Trywilk Realty Company*, 272 F. 2d 688, 691 (C.A. 4, 1959).

Moreover, as this Court pointed out in *McNabb, supra*, (88 App. D.C. 379, 190 F. 2d at 610), among the circumstances to be considered in determining the existence of fraud "is whether the . . . [representation] is expressed by a party having superior or perhaps exclusive knowledge to one without such knowledge . . ." Thus, where, as here, the

concealed information concerned the employers' "own business . . . which he is bound and must be presumed to know" (*Darnell v. Darnell*, 91 App. D.C. 304, 200 F. 2d 747, 748) and the unions had no independent means of ascertaining this information, the employers had an absolute duty to disclose.³²

And as clearly as the material concealments by the employers vitiated any union "consent" under established common law rules, they even more plainly had that effect under established labor law principles. If material concealment vitiates consent in the law of private contract, where the parties have the choice whether to deal with each other, it surely does so in labor relations where the law requires the employer and the certified union to negotiate with each other. *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574. Indeed, disclosure rather than concealment is the mandate of the National Labor Relations Act with respect to all facts material to the bargaining between the parties. See, e.g., *Labor Board v. Truitt Manufacturing Co.*, 351 U.S. 149; *Labor Board v. Acme Industrial Co.*, 385 U.S. 432; *Curtiss-Wright Corp. v. NLRB*, 347 F. 2d 61. The scope of authority of the bargaining representative of the opposing party is most material, particularly where the party who conceals

³² Indeed, it is a general principle that even in the absence of intentional misrepresentation or concealment a mistake knowingly or negligently caused by one party makes the contract voidable at the option of the other. See Corbin on Contracts, Sections 106, 610; *Darnell v. Darnell*, *supra*; *Potucek v. Cordeleria Lourdes*, 310 F. 2d 527 (C.A. 10), cert. denied, 372 U.S. 930. In *Darnell*, the District Court had denied relief because the plaintiff in an action for fraud had failed to prove fraudulent intent, which the court deemed a necessary element of her case. On review, this Court reversed, ruling (91 App. D.C. 304, 200 F. 2d at 748) that,

"The decisions of this court do not support this view . . . They hold that where a contract is executed upon the basis of a material misrepresentation of fact made by a party to it, which is relied upon, and where the . . . representation is with respect to his own business or property for the purpose of being acted upon and is relied upon, the truth of which he is bound and must be presumed to know, there is actionable fraud. . . . We think no rule casting a greater burden upon the plaintiff has been approved in this jurisdiction."

is claiming that by recognizing the Association the union waived its statutory right to bargain in individual units and gave its necessary consent to the creation of a multi-employer unit. Thus, under NLRA principles making disclosure the rule in the relationship between the bargaining parties, the established common law principle of misrepresentation by concealment has even greater significance.²³

What does the Board's decision say to the critical concealment objection voiced by the unions? Nothing at all. The Board nowhere suggests how the unions could have given life and validity to an arrangement among the employers whose material ingredients were purposely concealed from their knowledge in the hope that ignorance would secure assent. The Board's eloquent silence gives final demonstration to the fact that this simply is not, any more than it was at the time of the Board's first Decision and Order, a *Buffalo Linen* case. To say that the unions consented to a joint bargaining arrangement among the employers whose ingredients were concealed from them, is to substitute a fiction for the requirement of union consent to a multi-employer bargaining unit.

Under these circumstances the Trial Examiner's finding that the ingredients of the employers' association were

²³ This Court has recently recognized the importance of candor in determining the rights and obligations attendant upon joint bargaining. *Retail Clerks Union No. 1550 v. NLRB*, 117 App. D.C. 336, 330 F. 2d 210, affirming *Kroger Co.*, 148 NLRB 569. In affirming the Board's dismissal of a complaint against Kroger for refusing to accept the pension provision negotiated by a multi-employer association, although Kroger had participated in the joint negotiations, this Court emphasized that Kroger had not misled the union regarding the limitations which it had placed on the multi-employer representative to bind it with respect to pensions (330 F. 2d at 215):

"Had Kroger sat through the joint sessions with no intimation of its purposes with respect to pensions, we would have a different case. This would be especially true if the course of the negotiations suggested that the Union might have been weakening or trading off some of its other demands in the hope of getting agreement on pensions. One may not seek the benefits of joint bargaining without risking exposure to the burdens."

purposely concealed from the unions because disclosure might have endangered acceptance, simply adds insult to injury. If anything, by emphasizing that the offerors depended upon ignorance or mistake by the union in order to win its acquiescence, the Trial Examiner highlights the absence of the disclosure necessary to create a binding agreement.

We have briefed the fatal weaknesses in the Board's *Buffalo Linen* rationalization on the record which was before the Board. But if there were any remaining room for doubt on that record, it would be resolved by key evidence which was *not* before the Board: the judicial admissions made on May 24, 1966 before this Court by the employers' counsel during the oral argument in No. 19,842. A motion by petitioners to make those admissions available in the remanded Board proceedings by release of this Court's transcription was denied by this Court in No. 19,842 on Sept. 19, 1966. Following a renewed motion filed by petitioners in October of 1967 the oral argument transcription was released to the parties on November 14, 1967 (instruction of the Court by letter from the Clerk to the parties). The admissions made therein by the employers' counsel finally and conclusively dispel any *Buffalo Linen* contention in this case, for they constitute critical confessions on the absence of employer intent and union agreement to merge separate units which are requisite for invocation of a *Buffalo Linen* multi-employer-unit lockout.

During the oral argument for intervenors by Counsel Prael (*infra*; pp. 13a-19a) the following admissions appear concerning the absence of employer intent at the time they formed their Association to create a multi-employer unit:

"Mr. PRAEL: . . . Counsel who wrote this agreement took a different view of Buffalo Linen than either the

Board or the union. They read Buffalo Linen very different. When I tried the case I read Buffalo Linen very different. The assumption is that they locked out to preserve the unit. That is said over and over again, and even by my supporters, the Board. Why did they lock out? . . . They locked out to protect themselves in the negotiations. . . . There's no reference in the basic agreement to lock out to protect the unit. The obligation is to lock out to protect the members in the negotiations . . . We did not plead that we locked out to preserve the unit; we locked out in accordance with the agreement to protect ourselves in the negotiations, and that is an obligation merely that we would lock out in accordance with American Ship, gentlemen nothing else [*infra*, pp. 13a-14a] . . ."

"In Buffalo Linen, there was a bargaining unit; yes. A multi-employer bargaining unit. But we did not view the case so narrowly . . . We did not feel that the bargaining unit theme was the essential basis of Buffalo Linen [*infra*, pp. 14a-15a] . . ."

"But now, another thing, gentlemen; in writing this basic agreement, the lawyers did not read Buffalo Linen as narrowly. There's no record—as a matter of fact, there's no records of forming a bargaining unit in the basic agreement. They bargained collectively. They were bound to certain obligations. They were bound to lock out [*infra*, p. 17a] . . ."

Surely significant is the repeated confession that the employers "did not feel that the bargaining unit theme was the essential basis of Buffalo Linen" and that they "did not plead that we locked out to preserve the unit" but "merely that we would lockout in accordance with American Ship, gentlemen, nothing else."

Equally revealing is the answer of counsel Prael to questions by Judge Bazelon about why the employers refused (with a mere laugh) to show their Association agreement to the unions. Mr. Prael affirmed that the Association

agreement among the employers was "none of the union's business" and was therefore not produced for examination:

"The COURT: Is there any significance . . . to employers refusing to show the agreement between themselves to the union?

"Mr. PRAEL: During the bargaining sessions, one of the union negotiators asked Mr. Wyatt 'Could we have a copy of your basic agreement?' And he laughed at him . . .

"The COURT: I see. So your opinion—the answer to my question is—I just want to get this straight—that it's none of the union's business what the agreement was between the employers.

"Mr. PRAEL: Exactly, exactly [*infra*, pp. 17a-18a] . . ."

Of course, if the employers did not seek to create a true multi-employer unit (and thus to claim the lockout privilege of *Buffalo Linen*), but merely a loose bargaining association of convenience, the terms of the employers' Association were "none of the union's business." But if a multi-employer unit was desired, it was *decidedly* the unions' business what the terms of the employers' association were. Indeed, they lay at the very *core* of the unions' necessary consent, for it is the merger arrangement between separate unit employers to which union agreement is necessary before separate units are merged in legal effect. Mr. Prael's none-of-their-business confession that no union consent was sought for a multi-employer unit, and his repeated emphasis that there was no effort at "forming a bargaining unit in the basic agreement", leave no further room for *Buffalo Linen*. The admissions by the employers' counsel before this Court constitute the highest form of evidence, which provide the final insuperable obstacle to an affirmation of the Board's attempted rationalization of this case under *Buffalo Linen*.

Conclusion to Point II

The Board's *Buffalo Linen* rationale is vulnerable both in the premises upon which the Board would dispose of the critical underlying issues, and in its utter silence on numerous objections by the unions upon which the Board cannot even conjure up the semblance of a response. In the last analysis the central vice of the Board's *Buffalo Linen* rationale is thus the same vice which underlies the *American Ship* portion of its decision. The vice is that without clear and advised union agreement to the merger of separate-employer bargaining units, employers are deemed privileged to support their struck competitors by sympathy, solidarity, and secondary lockouts. The plain text and clear intent of Sections 8(a)(1) and (3) preclude that result. Competing employers are simply not privileged to enter into group boycott arrangements, expanding any strike against an individual employer into a general industry shut-down by a "strike-against-all" lockout.

Where unions agree to the extinguishment of separate bargaining units the *Buffalo Linen* exception applies, but they did not so agree in this case. And contrary to the Board's repeated insistence, *American Ship* is another case entirely, which cannot validate a concerted lockout to support a struck competitor in a separate bargaining unit. Accordingly, the Board's decision herein should be reversed.

Respectfully submitted,

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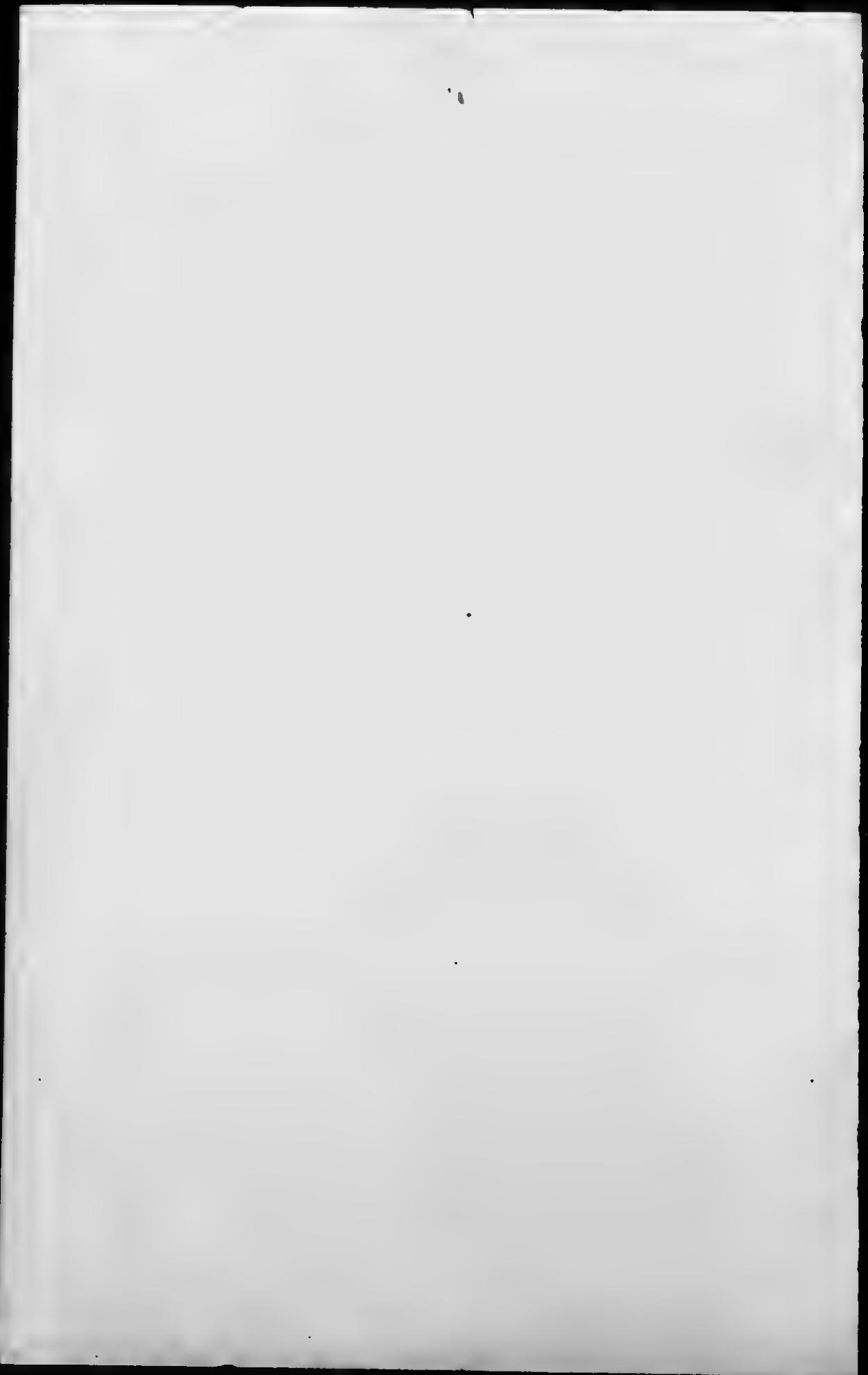
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SUPPLEMENTAL JOINT APPENDIX



166 NLRB No. 7

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 36-CA-1261

Case No. 19-CA-2652

WEYERHAEUSER COMPANY; CROWN ZELLERBACH CORPORATION;
RAYONIER INCORPORATED; INTERNATIONAL PAPER COMPANY;
AND ASSOCIATION

and

WESTERN STATES REGIONAL COUNCIL NO. 3, INTERNATIONAL
WOODWORKERS OF AMERICA, AFL-CIO

and

WESTERN COUNCIL OF LUMBER AND SAWMILL WORKERS, AFL-
CIO

SUPPLEMENTAL DECISION AND ORDER

On November 16, 1965, the National Labor Relations Board issued its Decision and Order in the above-entitled proceedings, finding that the Respondents had not engaged in the unfair labor practices alleged in the complaint, and dismissing the complaint in its entirety.¹ Subsequently, on a petition to review the Board's Order, the United States Court of Appeals for the District of Columbia Circuit remanded the case to the Board for further proceedings.²

On August 31, 1966, the Board afforded all parties to the case an opportunity to file additional briefs. Thereafter, briefs were filed by the Charging Parties, the Respondents, and the General Counsel; the Respondent filed a brief in reply to the briefs of the Charging Parties and the General Counsel; the Charging Parties filed an answering brief to

¹ 155 NLRB 921.

² 365 F. 2d 934.

the brief of Respondents; and the Respondents filed a Motion to Strike a supplement submitted with the brief of the Charging Parties.³

Pursuant to the Court's remand, the Board has reconsidered its Decision and Order. In doing so, the Board has considered the Trial Examiner's Decision, the exceptions and briefs filed prior to the Board's Decision and Order, the briefs filed following the Court's remand, the answering and reply briefs, and the entire record in the case.⁴ Based on the evidence in the record as a whole and for the reasons hereinafter set forth, the Board finds that the lockout by the four Respondent members of the Association, following the Unions' strike against the other two members of the Association, was lawful, whether the lockout is judged under the principles announced by the United States Supreme Court in *American Ship Building Company v. N.L.R.B.*, 380 U.S. 300, and *N.L.R.B. v. Brown*, 380 U.S. 278, as the action of individual Employers bargaining together in an informal structure, or is judged under *Buffalo Linen* standards⁵ in the context of a multiemployer bargaining unit, as was done by the Trial Examiner. In the light of the Court's remand, we shall examine the Respondents' conduct under both tests.

The Trial Examiner found, and we agree, that the six Employers comprising the Association had effectively established a multiemployer bargaining unit within the meaning of prior Board precedents, and that both Unions ac-

³ In view of the Board's disposition of this case, Respondents' Motion to Strike is hereby denied.

⁴ The request of the Respondents and the Charging Parties for oral argument is denied, as the record herein, including the exceptions and briefs, adequately presents the issues and positions of the parties.

⁵ *Buffalo Linen Supply Company*, 109 NLRB 447, affd. sub nom. *N.L.R.B. v. Truck Drivers Local Union No. 449*, 353 U.S. 87. In its original Decision and Order herein, the Board held that the lockout was lawful under the broad holdings in *American Ship* and *Brown*, regardless of the precise legal status of the Association. It found it unnecessary, therefore, to pass upon the Trial Examiner's findings that the Association was established and accepted by the Unions as a formal multiemployer bargaining unit, and that the lockout was thus lawful under *Buffalo Linen*. Member Brown, agreeing with the Board's result, would have affirmed the findings and conclusions of the Trial Examiner.

cepted that unit in the course of bargaining. The test to be applied in assessing the status of the Association as a multiemployer unit is well established: it is whether the members of the group have indicated from the outset an unequivocal intention to be bound in collective bargaining by group rather than individual action, and whether the union representing their employees has been notified of the formation of the group and the delegation of bargaining authority to it, and has assented and entered upon negotiations with the group's representative.* It is clear from the record herein that the six Employers who formed the Association possessed the requisite intention to be governed by group action. Thus, all of the Employers recognized from the outset that the Association was to function as a fully bound group. Indeed, prior to the final formation of the Association, two prospective members, Simpson Timber and Scott Paper, refused to join the new organization specifically because they did not wish to participate on a fully bound basis. Moreover, Wyatt, the spokesman for the Association and its members during negotiations, advised both Unions at the start of the negotiations with each that all Employers would be bound by any agreement reached between the Union and the Association. Finally, following agreement between the parties, a settlement agreement with the Unions was, in fact, signed by Wyatt for the Association on behalf of all its members.

We find unpersuasive the various factors relied upon by the Charging Parties and the General Counsel in an attempt to demonstrate that the Employers were not committed to be bound by the action of the Association in bargaining. The facts enumerated above, demonstrating the required commitment to group action, easily outweigh the use of the word "voluntary" in the organic agreement and in letters to the Unions advising of the formation of the Association. In context, the use of "voluntary" is most reasonably interpreted as a descriptive term referring to the status of the Association, like that of any multiemployer association, as one founded on "consensual relationship" among its

* *The Kroger Co.*, 148 NLRB 569; *Van Eerden Company, etc.*, 154 NLRB 196.

members. *Publishers Association of New York City, et al. v. N.L.R.B.*, 364 F. 2d 293, 295 (C.A. 2). Nor do we consider the fully bound nature of the Association to be impaired by the provision in the organic agreement that issues were to be resolved by a 75 percent vote. That provision was reasonably explained by Weyerhaeuser's size vis-a-vis that of its fellow members and the fact that each Company had only one vote, regardless of size. And, although certain of the testimony leaves it unclear as to the number of negative votes necessary to "veto" a proposal, it is quite clear that at least two negative votes were required.⁷ Nor does the exclusion of certain specific issues from group bargaining by the members of the Association dictate a different conclusion, for the Unions were aware from the outset of bargaining of the subjects to be negotiated on an individual basis, and both Unions agreed to the exclusions during the course of bargaining. Moreover, the issues thus excluded from group bargaining were those which traditionally had been reserved for bargaining at the local plant level.⁸ Finally, as set forth below, we find that Charging Party, Lumber and Sawmill Workers (LSW), agreed during negotiations to the exclusion of certain specified plants from group bargaining.

For the reasons stated above and by the Trial Examiner, and based on the evidence in the record as a whole, we find that the Companies comprising the Association sufficiently indicated from the commencement of bargaining with the Unions the necessary intention to be governed by joint action. Indeed, the Board has found a multiemployer unit "even though the employers had never formalized themselves into an employer association, a requirement the Board has never demanded. Substance rather than legalistic form is all the Board has ever required in multiemployer bargaining."⁹

⁷ For this reason, it is unnecessary to pass upon the legal effect of a provision, in a like context, under which one member of a multiemployer association could preclude acceptance of a bargaining proposal.

⁸ See in this regard *The Kroger Company, supra; The Kroger Company*, 141 NLRB 484, affd. sub nom. *Retail Clerks v. N.L.R.B.*, 330 F. 2d 210 (C.A.D.C.).

⁹ *Town & Country Dairy*, 136 NLRB 517, 523.

We also agree with the Trial Examiner that both Unions, after their favorable responses in a series of discussions with Lowry Wyatt, who represented Weyerhaeuser and subsequently became Chairman of the Association's bargaining committee, to feelers about the prospective formation of the Association, and after formal notification of the Association's actual creation and the delegation of bargaining authority to it by each of the six Employer members, accepted the new multiemployer unit by their participation in the negotiations. Thus, both treated with the Association *qua* Association, by submitting their proposals to the Association as such and by responding to its offers as group offers. Moreover, the Unions agreed to the establishment of several joint Association-Union committees to study and make future recommendations on several subjects of negotiation. Additionally, in the case of LSW, the notes taken by its recording secretary, Ted Prusia, at the initial bargaining session with the Association on May 9, rebut that Union's contention that no agreement on the new unit was reached because of the Association's insistence on excluding three plants located east of the Cascade Mountains. Those notes show that, prior to a Union caucus at 2 p.m., no agreement had been reached because of the issue of plants sought to be excluded by the Association. Following that caucus, however, the notes reveal clearly the Union's concession on that point and its recognition of the Association prior to the commencement of bargaining on economic issues.¹⁰

¹⁰ Prusia's notes covering the portion of the May 9 negotiations immediately following the caucus referred to above, read as follows:

Johnston: The Western Council Negotiating Committee is representing all of the Local Union and we will be speaking for all of our Locals and you will be speaking for all, but three plants. We will agree to recognize you as an association for collective bargaining on wages and not only on your issues, but also our issues that we have or will present to you.

Wyatt: I understand your position; but I want it understood that this association can not speak for the plants excluded. And, in agreeing with your points, it does not mean that we are in agreement on all issues at this time.

Roberts: (For St. Regis) We will be speaking only for the plants

It was not until some time after the lockout started that the Union, while continuing to bargain with the Association, sought for the first time to deny the existence of a multi-employer bargaining unit. But that belated denial, which was inconsistent with the Unions' contemporaneous dealings, cannot be held to have destroyed the previously accepted bargaining framework. The Association refused to agree to any such interpretation and consistently maintained its original representative authority and status.¹¹ The fact that the settlement agreement finally concluded was entered into by the Unions with the Association serves to confirm the validity of the finding we make that a multi-employer unit was created and maintained.

In the circumstances of this case, we agree with the Trial Examiner that the individual units of each of the Employer-members of the Association were effectively merged into a multiemployer unit by virtue of the joint bargaining engaged in between the Association and the Unions.¹² Therefore, following the Unions' selective strike against two members of the Association, the remaining members were

listed [west of the mountains] and we will be willing to meet at Klickitat and Libby on the issues at those plants.

Hartley then presented to the Association Committee the letter stating wage demand and also on master agreement approach. Employers took time off to read the letter.

¹¹ Had the Unions' action at that time been construed as an attempted withdrawal, a position they did not take for obvious reasons, it would of course have been untimely and ineffective. *Ice Cream & Frozen Custard Employees, etc.*, 145 NLRB 865; *Universal Insulation v. N.L.R.B.*, 361 F. 2d 406 (C.A. 6); *N.L.R.B. v. Sheridan Creations, Inc.*, 357 F. 2d 245 (C.A. 2), cert. denied 385 U.S 1005

¹² *Safeway Stores, Inc.*, 148 NLRB 660; *Town & Country Dairy, supra*. The case of *The Great Atlantic and Pacific Tea Company*, 145 NLRB 361, enfd. in relevant part, 340 F. 2d 690 (C.A. 2), relied upon by the General Counsel, is factually distinguishable. The union and employers there bargained—both prior to and following the strike and lockout—primarily about the existence of a multiemployer unit, rather than economic issues. In the instant case, the parties bargained extensively over economic issues, both during the approximately 12 bargaining sessions prior to the lockout and those subsequent thereto. And, as discussed in more detail, *infra*, the breakdown in negotiations which occurred in early June resulted from the failure to reach agreement on economic issues,

entitled to preserve the integrity of the multiemployer unit by the lockout employed herein.¹³

For the reasons stated above and by the Trial Examiner, the Board adopts the Trial Examiner's conclusions that the Employers formed a valid multiemployer unit, that the Unions accepted such unit, and that the lockout on the part of the four Respondent Employers was lawful under *Buffalo Linen*. Assuming, *arguendo*, however, that a formal multiemployer unit either had not been formed or had not been accepted by the Unions, the Board reaffirms its original holding that the lockout was lawful under the principles announced by the Supreme Court in its interrelated opinions in *American Ship* and *Brown*, *supra*, to govern lockouts generally.

In its original Decision, the Board concluded that those principles control in the instant situation where, "two or more employers bargain jointly with a union, an impasse in negotiations is reached over a mandatory subject of bargaining, and the union strikes only some of the employers engaged in such joint bargaining."¹⁴ On review, the Court of Appeals questioned certain aspects of the Board's treatment of the case and remanded it to the Board for further consideration. The Court first noted that the case had been tried before the Trial Examiner under a *Buffalo Linen* theory, but that the Board had rested its Decision on a different basis. Because of this, said the Court, the Board in effect judged the Respondents' conduct in the light of the motivation upon which they "might" have acted, rather than that upon which they did act.

With all due respect for the Court, we view the matter differently. The essence of our original holding was that, examined in the light most favorable to the General Counsel, the Respondents' conduct—as established at the hearing—did not violate the Act under the recent holdings of the Supreme Court. Thus, it is apparent from the record that the Respondent Employers locked out their employees to principally wages. Therefore, also unlike *A&P*, it cannot be said here that the lockout was utilized to compel the Unions to accept a multiemployer unit.

¹³ *Buffalo Linen Supply Company, supra*.

¹⁴ *Weyerhaeuser Company, supra*, at 923.

protect the unity of the bargaining position taken jointly by all members of the Association, pursuant to the agreement establishing the Association. Moreover, the lockout provisions of the agreement were by their express terms operative only "with respect to subjects of bargaining delegated to the Association." Contrary to the assertions of the Charging Parties, the lockout provision of that agreement cannot be viewed in isolation from the provisions delegating to the Association the authority to represent its members in presenting to the Unions a bargaining position common to all, as discussed more fully below. It is true, of course, that prior to *American Ship and Brown*, the lockouts probably would have been found unlawful on this record if no formal multiemployer unit existed or had been recognized by the Unions. But with the issuance of those decisions, the state of the law on lockouts, and the standards to be applied thereunder, underwent a change of controlling significance to our determination. Therefore, accepting the Respondents' purpose—"to protect the interests of our group against this selective strike,"—as announced at the time of the lockout, the Board held that, under the tests of *American Ship and Brown*, the Respondents had not violated the Act even if they were incorrect in believing that the unity of their bargaining position was founded on the legal existence of a formal multiemployer unit. Unless that mistaken belief (assuming the absence of such a unit) can be transformed into the unlawful motivation now required by the Supreme Court, it is difficult to find a basis for holding that the lockout violated Section 8(a)(3) and 8(a)(1).

In judging the critical issue of motivation, the burden is, of course, on the General Counsel to prove unlawful motivation, rather than upon the Respondents to prove a lawful motive. Whether the General Counsel has satisfied that burden, apart from the multiemployer issue discussed above, depends upon the resolution of several subsidiary issues.

First, the Board found in its initial Decision that, as of June 5, "all six Employers had reached an impasse with the Unions over certain of the economic items being nego-

tiated."¹⁵ The record is replete with evidence supporting this finding. Thus, at the June 4 negotiations between the Association and International Woodworkers of America (IWA), Union spokesman Nelson announced that the parties were at an impasse and that IWA was discontinuing negotiations. Similarly, at the June 3 negotiations between the Association and LSW, the latter's representative, Hartley, observed that the parties were deadlocked. Moreover, in a letter addressed to locals of LSW on June 5, Hartley stated that the negotiations had "reached an impasse." Even tangible evidence of the existence of an impasse was provided by the Unions on June 5 in the form of their strike against St. Regis and U.S. Plywood.

It is equally clear that the impasse was reached on economic items, principally wages. Nelson, for example, indicated to the Association on April 29 that the Association's wage offer was so low as to make it apparent that the Employers were "intending to negotiate to a strike situation." Further, in a meeting with Wyatt on June 5, he stated that the Employers would have to do better concerning a general wage increase, loggers' travel time, and overtime, and abandon their "hours of labor" proposal. Wyatt listed the same items as the principal differences at the May 27 bargaining session, and stated that, at the June 4 meeting, the parties were still \$.15 apart on wages. Similarly, Johnston testified that, as of June 3, the amount of the wage increase was the principal issue in dispute, and LSW advised Wyatt that the Employers would have to raise their wage offer in order to avoid a strike. Later, on June 18, Hartley again stated that the wage offer was the key to the dispute.

The next matter to be considered is the nature of the bargaining in which the Association and the Unions were engaged. We agree with the Court of Appeals' characterization of our prior decision as holding "that there can be joint bargaining which falls short of a full-scale multi-employer unit but which still serves to bring a concerted multiple employer lockout within the protection of Ameri-

¹⁵ *Weyerhaeuser Company, supra*, at 922.

can Ship."¹⁶ In view of the Court's request for further explication of our view of joint bargaining, particularly in the present context, we turn now to the essential components of the bargaining conducted in the instant case. All six members of the Association advanced a common bargaining position through a single designated representative, a fact recognized by the Unions. The Unions in turn made common demands through the Association, which we here treat as their (the Employers') joint agent, upon all six Employers. Further, as noted above, each of the six Employers had committed itself from the outset of bargaining to be fully bound by any agreement reached on its behalf by the Association, and each of the Unions was so advised at the commencement of the respective negotiations.¹⁷ Whatever the effect in another context of the lack of a commitment to be fully bound on the part of employers, or the lack of knowledge of such a commitment by the union, those factors are not present herein.¹⁸ And, in our opinion, the factors enumerated above are ample to justify labeling as "joint" the bargaining conducted herein.¹⁹

¹⁶ 365 F.2d at 937. Indeed, were it otherwise, only those lockouts occurring in single employer or formal multiemployer unit situations could be found lawful, thus banning lockouts in all other forms of joint, or group, bargaining; a notion totally at odds with the letter and the spirit of the recent Supreme Court decisions.

¹⁷ Union recognition of this fact is evidenced, *inter alia*, by an IWA letter to its local unions, dated June 5, in which the locals were advised that certain of the members of the Association were being struck, and that this device would be "the most effective method to obtain an industry-wide settlement. . . ."

¹⁸ In *Evening News Association*, 186 NLRB No. 6, issued this date, a majority of the Board dismisses the complaint in the circumstances of that case, even though the two employers bargained separately with the Union involved, and had not entered into a binding commitment at the outset of the negotiations, as did the members of the Association herein.

¹⁹ In view of the varying forms of group bargaining, and mindful of the admonition of the Court of Appeals to eschew broad characterizations in judging specific conduct alleged to be unlawful, we deem it both unnecessary and undesirable to attempt to establish herein the precise limits of "joint bargaining" as a generally controlling legal concept.

But whatever label is attached, the determination of the six Employers to bargain together for common terms, and the attempt of the Unions to secure common terms from all of the Employers in the negotiations with

Finally, as found above, an impasse had been reached between both Unions and each, as well as all, of the Employers over the substance of the economic position being advanced for each by the Association, its designated agent.

In legal effect, then, each member of the Association at that time stood in the position of the employer in *American Ship*, and was entitled to lock out its employees in order "to affect the outcome of the particular negotiations in which it was engaged."²⁰ While that action had the conceded effect of supporting the bargaining position of the other Association members, the record herein compels a finding that that action was intended to, and did, support the individual (and common) position of each of the Employers engaging in the lockout. In these circumstances, we are unable to conclude that the General Counsel has met his burden of proving by a preponderance of the evidence either the presence of an unlawful motivation to discourage union membership or otherwise discriminate against union members as such, or the absence of a legitimate business interest on the part of the Respondents in locking out their employees. Nor has he proved that the Respondent's lockout was so inherently prejudicial to statutorily-protected rights as to warrant a finding of unlawful interference, restraint, or coercion in violation of Section 8(a)(1). The issue comes down to this: Does the fact that a lockout supports, and is designed to support, the bargaining position of other employers jointly ranged in bargaining alongside the locking out employers, who thus seek after impasse to strengthen

the Association and by means of their selective strike against two of the six, clearly reveal in the circumstances of this case that each of the Respondents had a legitimate business interest of its own to protect when it acted to support "the interests of the group", i.e., the common bargaining position they had taken in their joint dealings with the Unions.

²⁰ *American Ship*, *supra*, at p. 313. Indeed, under the Supreme Court's decision, it seems clear that the Employers herein, even in the absence of a strike of any kind, could have locked out their employees in support of the commonly held bargaining position following an impasse with the Unions. It would be anomalous, then, to hold that the right to take such action evaporated because the Unions initiated the economic combat by engaging in what they termed selective strikes against some members of the Association in order to obtain an "industry-wide settlement" from all six Employers.

their own bargaining positions against union whipsaw action taken to win common bargaining demands from all, necessarily make the lockout unlawful? We conclude after careful review that it does not.

Therefore, and for the reasons set forth in our initial Decision in this case, we reaffirm our conclusion that the lockout by the Respondent Employers herein was lawful under the principles set forth by the Supreme Court in *American Ship and Brown, supra*, even if the Association be viewed as something less than a formal multiemployer unit.

On both of the bases set forth above, we shall dismiss the complaint herein.²¹

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated, Washington, D.C., June 29, 1967.

FRANK W. McCULLOCH,
Chairman.

JOHN H. FANNING,
Member.

GERALD A. BROWN,
Member.

HOWARD JENKINS, JR.,
Member.

SAM ZAGORIA,
Member.

National Labor Relations Board.

(SEAL)

²¹ In joining in the dismissal of the complaint, Member Brown relies solely on the grounds stated by him in the original Decision and Order, namely, the Association had been established and recognized as a multi-employer unit and the Respondent Employers' lockout action was accordingly lawful under *Buffalo Linen, supra*.

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT

No. 19,842

WESTERN STATES REGIONAL COUNCIL No. 3, et al.

vs.

NATIONAL LABOR RELATIONS BOARD

The argument of CHARLES S. PRAEL came on for hearing before the United States Court of Appeals for the District of Columbia Circuit at the United States Courthouse, Fifth Floor, Washington, D. C. 20001.

PROCEEDINGS

Mr. PRAEL: If your Honor please, I want to come to this question of what the employers thought in—when they locked out. What did they think? It's been repeated and repeated that these employers locked out pursuant to an obligation. That obligation was written in late 1962 and early 1963. It's referred to and referred to as an agreement seven or eight times in the petitioner's brief as an obligation by certain employers to lock out in the event of a strike against any employer.

That isn't what it says at all. It isn't even limited to lock-out in the event of a strike against any—any strike against any member of the association. There are only certain kinds of strikes that will trigger this obligation: strikes which were brought by the union as a result of association bargaining on behalf of its members.

Counsel who wrote this agreement took a different view of Buffalo Linen than either the Board or the Union. They read Buffalo Linen very different. When I tried the case I read Buffalo Linen very different. The assumption is that they locked out to preserve the unit. That is said over and over again, and even by my supporters, the Board. Why did they lock out?

They locked out because of an obligation, and for this reason: it says so in the agreement and it was written long

before American Shipbuilding, and it states the American Shipbuilding purpose. They locked out to protect themselves in the negotiations. There's no reference to locking out to protecting a unit. There's no reference in the basic agreement to lock out to protect the unit. The obligation is to lock out to protect the members in the negotiations.

For lawyers who had to look three years ahead to see American Shipbuilding, they came awfully close. I didn't write the agreement, so I can't claim the honor. We did file the answer; I had something to do with that. That's referred to by my opponents, the answer which we filed in 1964, before American Ship was decided. We did not plead that we locked out to preserve the unit; we locked out in accordance with the agreement to protect ourselves in the negotiations, and that is an obligation merely that we would lock out in accordance with American Ship, gentlemen, nothing else.

We tried this case, not on the theory that is recited in the petitioner's brief at all. We viewed Buffalo Linen as this: when you have a lock-out in a bargaining situation, as long as you act defensively—this is 1962 and '3 law—as long as the employer acts defensively, or there is no question the lock-out is impliedly valid, unless by independent evidence, as stated by the Supreme Court in Buffalo Linen, they can prove we had an unlawful motive. All we were interested in at that time, before American Ship, was to show that there was bargaining of some kind, there was an impasse, and the union shot the first gun. They struck first, and under Buffalo Linen, it was a defensive lock-out, and at that time a defensive lock-out in bargaining contracts was perfectly valid and not presumed to be invalid under the Act. And they hadn't proved by independent evidence that we had an unlawful motive. That's what we argued; that's what we pleaded.

The COURT: For Buffalo Linen, however, I assume all the multi-party units agreed to by the—

Mr. PRAEL: In Buffalo Linen, there was a bargaining unit; yes. A multi-employer bargaining unit. But we did not view the case so narrowly. American Ship dealt with ships, gentlemen; this is a lumber case. I don't think there is any distinction. We did not feel that the bargaining unit

theme was the essential basis of Buffalo Linen. As long—in that case, the big argument was—the theory was, as long as the employers act defensively in bargaining and would not attempt to undermine the union, as it were, they've got to prove an unlawful motive by independent evidence. We tried the case on that theory; we pleaded it; this rule was written on that theory. Not that we—

The COURT: Buffalo Linen really contemplated a quid pro quo, didn't it, that they give you the lock-out if the union got the obligation of all employers to agree to the—

Mr. PRAEL: I don't think you got the lock-out as a result of the quid pro quo. They can strike, we can lock out, both of them as a matter of law, not an exchange. This is something we bargained for; this is something that comes from an interpretation of the law, gentlemen, an interpretation of the law. Now—

The COURT: But you can't strike, you can't lock-out in concert, and that is what this case is all about, lock-out in concert—

Mr. PRAEL: In concert?

The COURT: That's right. But then you get into secondary considerations.

Mr. PRAEL: Now, let's get to the secondary; let's get to the secondary. Petitioner's brief proceeds on the theory—that the agreement provides, not as I have pointed out, to locking out only when there is an attack upon all six members, as a result of negotiation bargaining, and I trust you will find time to read it, because I don't have time to read it—the Exhibit referred to is—Respondent's 378.

We talk about this as being a collective strike against two employers; the strike was not against two employers. The strike was against all six members, and the timing of the walk-outs was varied according to what the strategy of the union was, and it's declared in there to be, in fact, on all six. Says "We're walking out in some plants now; we'll walk out on the others when time and strategy dictate."

This is—in other words, this wasn't just a strike against U. S. Plywood or St. Regis; it was a strike against them all, with walk-outs immediately limited to the plants of two companies, but they threatened to walk out when it suited them in the others, and I don't think there's any law that

requires the employers under attack in such situations to—"we have to wait until you shoot us down one by one; we can't all stand together and exercise our lawful rights in a bargaining situation to protect our bargaining situation and lock out." I don't know of any such holding.

The COURT: In Brown, did the Supreme Court apply the test of American Shipbuilding or of Buffalo Linen?

Mr. PRAEL: In Brown Foods? That was—in that case they recognized the right of the employer to maintain—I think they were operating under Buffalo Linen in that case, because they had—it was a question of whether or not they had—the ones that shut down had a right to use replacements.

The COURT: That's right. Would it have been simpler, since they both came down on the same day, Brown and American Shipbuilding, would it have been simpler to apply the American Shipbuilding principle, rather than leaning back on Buffalo Linen?

Mr. PRAEL: Well, they had another problem in Brown Foods—well, they had the problem because it was not only a shutdown; see, they didn't really shut down. They laid off the workers and kept going.

The COURT: Same principle as economic aid there.

Mr. PRAEL: Yes, that's right. And they held that that was perfectly lawful in that situation; in other words, a lock-out need not be a shutdown of operations. It means relieving the employees of work, the union's representative employees of work and replacing them. It was thought that there might be a right of employers to lock out in the sense of "well, we can shut down only, shut our operation down." Under American Foods the Supreme Court made it clear that you're not so limited; you can lay off the union employees and at the same time, just as a struck employer, exercise the right of replacement, as I understand it.

The COURT: Brown held that other employers have a right to protect themselves against the employer they're trying to help.

Mr. PRAEL: Well, roughly that, I think. I'd say that's about it. I think that's right.

The COURT: It also held that the struck employer could

continue to operate and the other involved units could lock-out.

Mr. PRAEL: Lock out and continue to operate, too.

The COURT: Well, locked out.

Mr. PRAEL: Yes. In other words, they held that both the struck and the locking out employers could continue to operate with replacements, as I understand it.

Now, we aren't concerned with that problem here, because it was a complete shutdown right along the line. But now, another thing, gentlemen; in writing this basic agreement, the lawyers did not read Buffalo Linen as narrowly. There's no record—as a matter of fact, there's no records of forming a bargaining unit in the basic agreement. They bargained collectively. They were bound to certain obligations. They were bound to lock out, even though they didn't know it, as it turned out, exactly in accordance with American Shipbuilding principles, and in addition to that, the second sentence referred to, I think, by Board Counsel—the second sentence is very interesting too—because the second sentence in Section 7 on Page 7 of the Board's Brief, says "We will not lock out in the Detroit News situation. We will not have a secondary or sympathetic lock-out." That excludes secondary and sympathetic lock-outs; it says that if any one of the member employers gets in a fight with the union on its own, because of local conditions, or because of bargaining that it is doing on its own, it has its own fight—

The COURT: Is there any significance, as Mr. Ross testified, to employers refusing to show the agreement between themselves to the union?

Mr. PRAEL: During the bargaining sessions, one of the union negotiators asked Mr. Wyatt "Could we have a copy of your basic agreement?" And he laughed at him. Now, there wasn't any direct refusal. This was dealt with in a trial before—

The COURT: Is there any significance to this?

Mr. PRAEL: Is there any significance? No, I don't think there's any significance.

The COURT: That is true for the moment, that was a tacit refusal.

Mr. PRAEL: Yes, I don't—no; I think that it was a perfectly natural thing for Mr. Wyatt to do, if when—

The COURT: He could have answered—

Mr. PRAEL: He could have.

The COURT: Assuming this is a refusal, is there any significance to—

Mr. PRAEL: I don't think it means a thing, any more than if I walk in to bargain with a union representative and I say "Now, before we start bargaining I'd like the union constitution and by-laws, and see who's paying for all this." They wouldn't laugh at me; they'd tell me to go—well, I won't use the word.

The COURT: Why?

Mr. PRAEL: Because it's none of my business, that's why.

The COURT: I see. So your opinion—the answer to my question is—I just want to get this straight—that it's none of the union's business what the agreement was between the employers.

Mr. PRAEL: Exactly; exactly. The—if, in this situation, the question was—actually the agreement provided for how expenses would be paid and all that sort of thing; the—this is an issue which was before this Board but not before this Court, but I wanted to mention it, because there is reference to the 75% voting power as if there were some concealment. There's a statement that one employer had a veto power and he wanted to conceal it. One employer didn't have a veto power, because 75% of six, and 75% of five, no one employer has a veto power in that—75% was fixed.

One of the witnesses had gotten mixed up in his mathematics, in explaining it, but under such a rule, 75%, no one employer can veto the decision. Now there are in the record, as a matter of fact, two split votes by employers, because they went into all the operations of this association, the minutes and the finances and everything else. There were two votes where the votes of the employers were not unanimous; in both of them there was a defense by one employer, Weyerhauser, that the others carried the association and all six members followed that vote. In other words, the facts show that one could not—as a matter of mathematics of the 75% rule, one cannot veto it.

Now, this is not before you, but I mention these things because they're added for color here, as if there's something

wrong with that arrangement. We don't question whether the union has a right to submit to its members the contract they negotiate for a majority vote, whether they're going to have to vote by locals or they have to vote as a majority or whether they have to have a pool of their executive boards; that's a matter of internal union operations, and this is a matter of internal employer operations, and it did not affect the bargaining in any way.

I want to say one further thing. Since we did not construe Buffalo Linen as narrowly as did union counsel, or as did Board counsel, we do not construe American Shipbuilding as narrowly either. American Shipbuilding says that in the case of a lock-out in a bargaining context, the lock-out is not per se a violation, and it's up to the general counsel to offer independent evidence of an unlawful motive to discriminate against the employees, and there is not only no such evidence, there has never been any such claim, that this lock-out was for any other purpose than to protect the employers in the course of this negotiation.

Coming back again to this point, the unions argue that we locked out to save the unit. Is that different from locking out to further our bargaining position? Gentlemen, may I give you a very simple illustration? You go to the grocery store; you buy eggs in a carton, corrugated carton, little holes for each egg. What are those for? What are they for, why do they put them in that kind of a carton? To protect something. What? To protect the shell or to protect the egg? What are you trying to stop being broken? Oh! They're only to protect the shell, not the egg.

The Court: I don't mind if you go on—if you have a very important point to make, I want you to go on, but your time is—

Mr. PRAEL: I think I've made my point. Thank you.

(Mr. Prael's argument terminated at this point.)

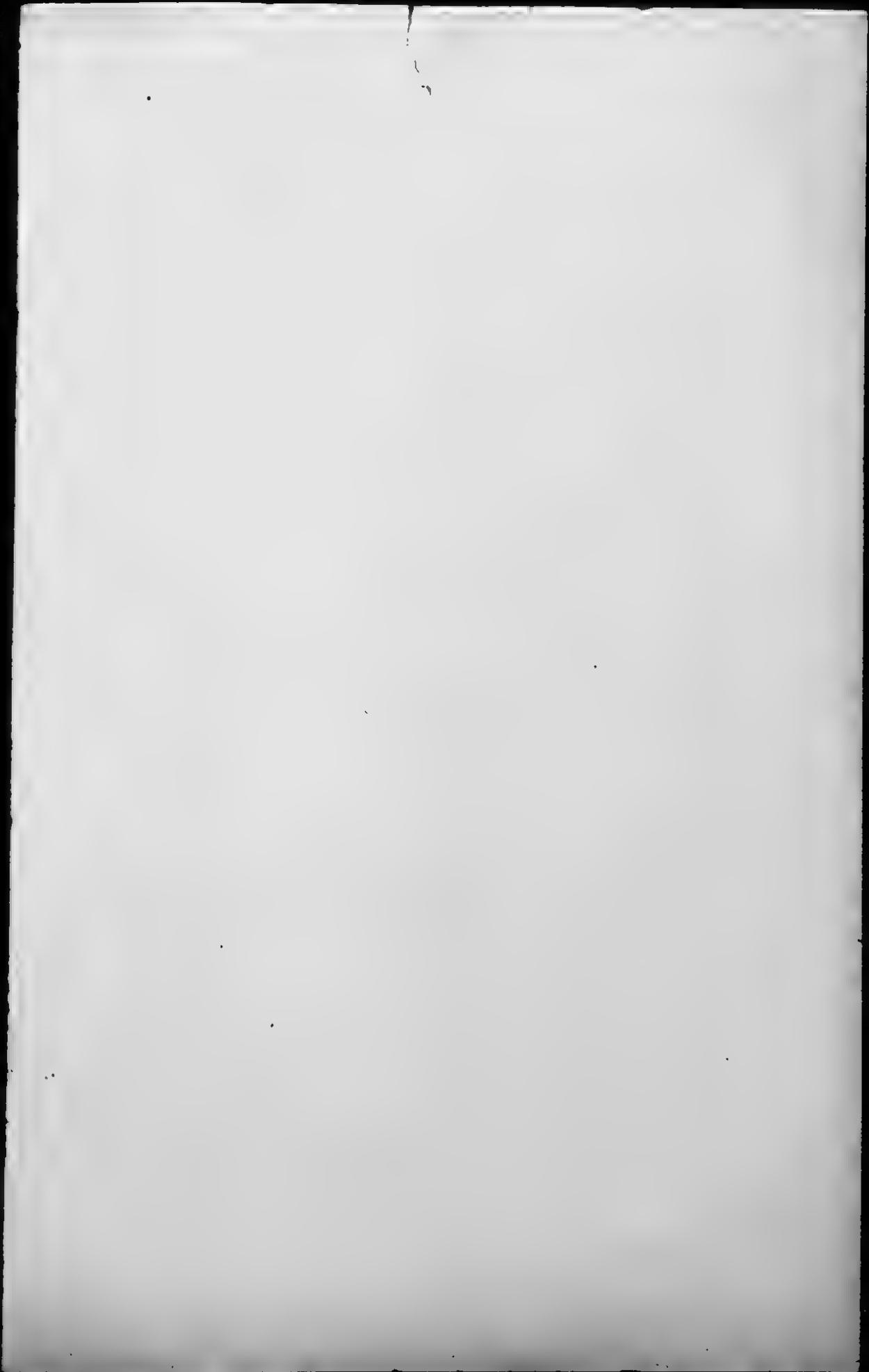
UNITED STATES OF AMERICA,
District of Columbia:

No. 19,842

I, PAUL R. CUTLER [PRO-TYPISTS INC., Professional Transcription Service], do hereby certify that the testimony of the witnesses in the foregoing proceedings was recorded by me from an original recording in the office of the Clerk of the U. S. Court of Appeals for the District of Columbia Circuit; that said testimony was transcribed under my direction, and that said transcript is a true record of the recorded testimony of the witness to the best of my knowledge.

/s/ PAUL R. CUTLER

(3139-3)



BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,317

WESTERN STATES REGIONAL COUNCIL NO. 3,
INTERNATIONAL WOODWORKERS OF
AMERICA, AFL-CIO

and

WESTERN REGIONAL COUNCIL OF LUMBER AND
SAWMILL WORKERS, AFL-CIO,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

WEYERHAEUSER COMPANY, CROWN ZELLERRACH
CORPORATION, RAYONIER INCORPORATED,
INTERNATIONAL PAPER COMPANY AND ASSOCIATION,

Intervenors.

On Petition to Review an Order of the
National Labor Relations Board

United States Court of Appeals

for the District of Columbia Circuit

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FILED FEB 26 1968

Nathan J. Paulson
CLERK

(i)

STATEMENT OF QUESTIONS PRESENTED

The questions presented, as formulated in the pre-hearing conference stipulation, are as follows:

1. Whether the Board properly found that the unions and employers created a multiemployer unit and that the intervenors' shutdown of their plants in response to the unions' strike of two employers in the multiemployer unit was lawful action under the *Buffalo Linen* case.
2. The Board and intervenors state that the second question presented is:

Whether the Board properly found that even in the absence of a multiemployer unit, employers using a single spokesman to bargain jointly with a union for common contract terms may, in order to advance the employers' common bargaining position, and absent any evidence of antiunion motivation, shut down their plants when the bargaining reaches an impasse and the union strikes some of the employers to enforce demands against all.

3. The petitioners state that the second question presented is:

Whether the Board properly ruled that in the absence of a multiemployer bargaining unit, the principle of *American Ship Building* validates a concerted lockout in response to a strike against individual employers bargaining in an association format.

This case under No. 19,842 was before a panel of this Court and was remanded on July 20, 1966, for further proceedings, and is now before the Court on a record which includes the original record on appeal.

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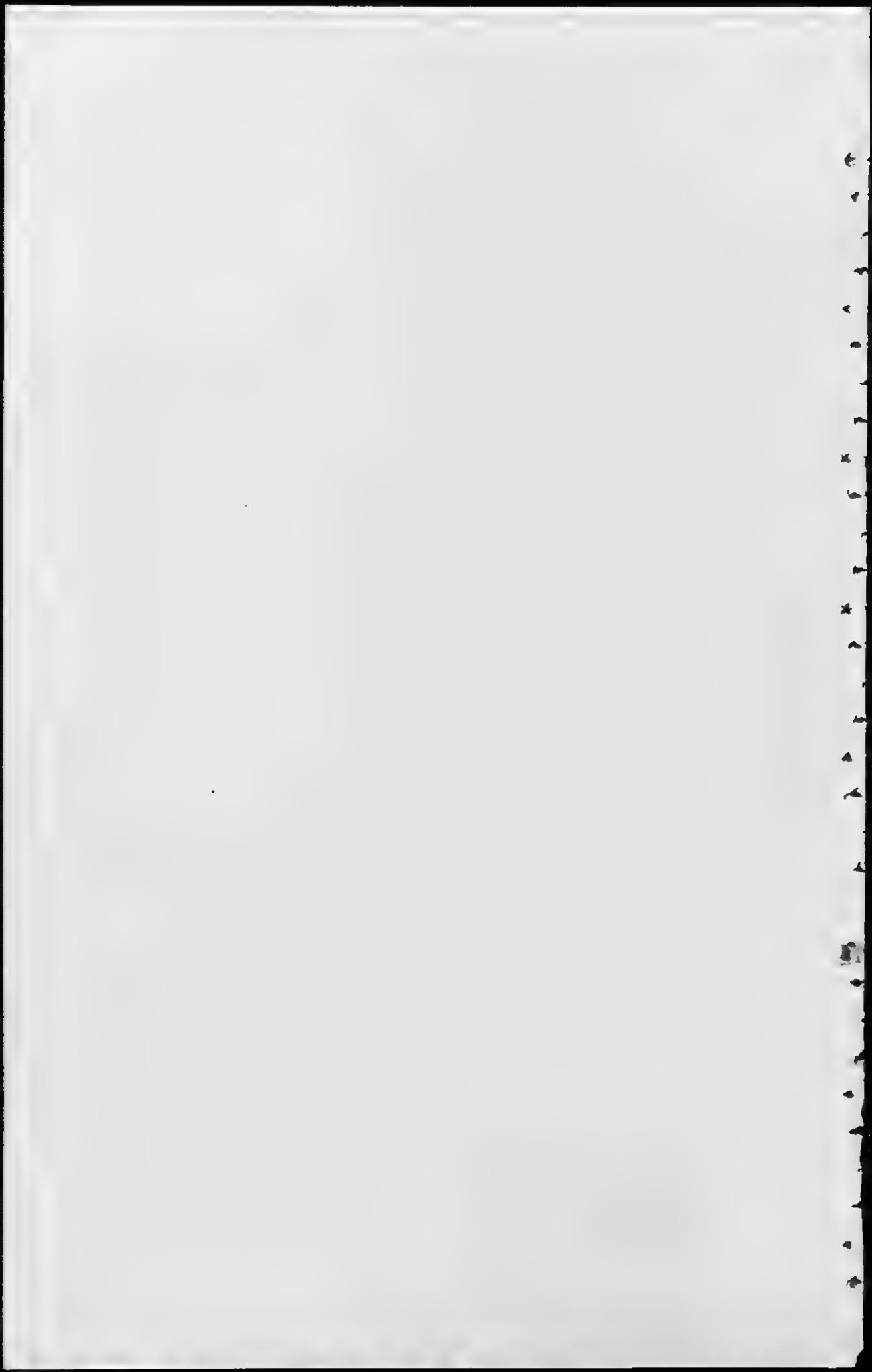
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,317

WESTERN STATES REGIONAL COUNCIL NO. 3,
INTERNATIONAL WOODWORKERS OF
AMERICA, AFL-CIO

and

WESTERN REGIONAL COUNCIL OF LUMBER AND
SAWMILL WORKERS, AFL-CIO,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

WEYERHAEUSER COMPANY, CROWN ZELLERBACH
CORPORATION, RAYONIER INCORPORATED,
INTERNATIONAL PAPER COMPANY AND ASSOCIATION,

Intervenors.

On Petition to Review an Order of the
National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

COUNTERSTATEMENT OF THE CASE

This case is before the Court upon petition of Western
States Regional Council No. 3, International Woodworkers

of America, AFL-CIO, and Western Regional Council of Lumber and Sawmill Workers, AFL-CIO (hereafter referred to as "IWA" and "LSW", respectively, and collectively as the "Unions"), filed pursuant to Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*), to review a supplemental order of the National Labor Relations Board issued on June 29, 1967. The Board's supplemental order, issued pursuant to remand under the Court's opinion of July 20, 1966, in *Western States Regional Council No. 3, et al. v. N.L.R.B.*, 125 U.S. App. D.C. 1, 365 F. 2d 934, reaffirms its prior order of November 16, 1965, dismissing an unfair labor practice complaint against intervenors Weyerhaeuser, Crown Zellerbach, Rayonier, International, and the Association. The Board's original decision and order (J.A. 1-5)¹ is reported at 155 NLRB 921. The Board's supplemental decision and order (S.J.A. 1a-12a)² is reported at 166 NLRB No. 7.

¹ "J.A." references are to portions of the record printed in the earlier Court proceedings as a joint appendix to the parties' briefs, and resubmitted in this proceeding pursuant to the parties' prehearing conference stipulation and the Court's order of October 27, 1967. Where a semicolon appears, references preceding the semicolon are to the Board's findings; those succeeding are to the supporting evidence. Exhibits lodged with the Court are referred to as "RX" (Respondents' Exhibit), and "GCX" (General Counsel's Exhibit).

² "S.J.A." references are to the supplemental decision and order reprinted in a supplemental appendix to petitioners' brief.

I. THE BOARD'S FINDINGS OF FACT

A. The Board's original decision and order

The Trial Examiner found that the four intervenor companies, together with two other companies,³ comprising the Association had effectively formed a multiemployer bargaining unit which was accepted by the Unions in the course of bargaining. He therefore concluded that the lockout by intervenors following the Unions' strikes against the other two members of the unit was a lawful defensive act against a whipsaw strike, sanctioned by the Supreme Court's decision in *N.L.R.B. v. Truck Drivers Local Union No. 449, Teamsters (Buffalo Linen)*, 353 U.S. 87. Accordingly, the Examiner recommended dismissal of the unfair labor practice complaint which alleged that the lockout violated Section 8(a)(1) and (3) of the Act (J.A. 92-93).

The Board found it unnecessary to pass on the Examiner's factual conclusions that the Association existed, functioned and was accepted by the Unions as a multiemployer bargaining unit, because, whatever the nature of the Association, the record showed that its six members bargained jointly to an impasse over economic issues. Thus, the lockout, whether in direct response to the strike against two members of the Association, or an economic action taken to further their own bargaining position after a bargaining impasse, was within the legitimate rights of the employers under the Supreme Court's recent decisions in *American Ship Building Company v.*

³ St. Regis Paper Company and United States Plywood Company.

N.L.R.B., 380 U.S. 300, and *N.L.R.B. v. Brown*, 380 U.S. 278. On this ground, the Board held that the intervenors did not violate the Act by locking out their employees in the circumstances found, and affirmed the Examiner's dismissal of the complaint (J.A. 2-5).

In its decision of July 20, 1966, the Court remanded the case to the Board for further explication regarding the extent to which, in the Board's view, *American Ship* permits a group of employers to utilize a bargaining lockout.

B. The Board's supplemental decision and order

Upon reconsideration, the Board affirmed the Trial Examiner's finding that the six employers comprising the Association had established a formal multiemployer bargaining unit, and that the Unions, in the course of bargaining, had accepted that unit. Accordingly, like the Trial Examiner, the Board concluded that the intervenors were entitled, under *Buffalo Linen*, to preserve the integrity of the unit by locking out their employees following the Unions' selective strike against two members of the Association (S.J.A. 1a-2a, 7a). Additionally, the Board reaffirmed its prior conclusion that the intervenors' action was permissible under the *American Ship* decision even if the Association was less than a formal multiemployer unit (S.J.A. 7a-12a).

The facts underlying the Board's findings may be summarized as follows:

C. The formation of the Association as a fully bound group

Beginning in the spring or early summer of 1962, Lowry Wyatt, a vice president of Weyerhaeuser, discussed with officials of various timber and lumber processing companies in the Pacific Northwest the formation of an association of employers to bargain collectively with unions to a settlement binding upon all parties (J.A. 15; 94, 95, 104-108). While in prior years other associations of employers had bargained with unions in the timber industry, none of the members had been fully bound to accept the results of the negotiations. Rather, the individual employers remained free to reject the contract recommendations (J.A. 15; 98). Wyatt felt that in order to effectively deal with labor costs and the need to improve productivity, it would be necessary that an association of employers with common interests in the long-range future of the industry be formed, and that this organization would have to bargain together with the Unions, and be bound by a common settlement (J.A. 15-16; 106-108).

Beginning in late September 1962, officials of eight companies met, and studies and reports concerning the practicability of forming such an association were made and examined; tentative drafts of an association agreement were prepared (J.A. 16; 108-110, 112, 116-124). Pursuant to a request by the committee, Wyatt contacted representatives of the IWA and LSW to ascertain their attitudes toward bargaining with such an association (J.A. 16-17; 124-125).

Wyatt met with Harvey Nelson, IWA president, in mid-February. Wyatt outlined plans for the association, explained the advantages to be attained from it, and indicated that he

wanted Nelson's opinion before proceeding further (J.A. 17-18; 125-129, 443, 455-457). Wyatt also told Nelson that the association would probably reserve union security, pensions, and health and welfare for individual company negotiations (J.A. 17; 125-126). Nelson replied that he anticipated no undue problem with these reservations and saw nothing basically wrong or unsound in what Wyatt had proposed; rather, it could be beneficial for all major companies in the industry to get together on general negotiations (J.A. 18; 128, 456-457, 524-525).

Wyatt then met with Earl Hartley, LSW Executive Secretary, and similarly described the proposed association as a "fully-bound group" (J.A. 18; 129-131). Wyatt also explained that for the first year at least it would not be advisable to include the reserved subjects in association negotiations, to which Hartley stated he could see no problem (J.A. 18; 131). Wyatt emphasized that settlements reached by the association would be binding on its members (J.A. 18; 131-133). Hartley stated that while he personally could see no problem with what Wyatt had outlined, he wished to discuss the matter with others before taking a position.

Several days later, Hartley telephoned Wyatt and informed him that he had spoken with a number of his people, and that they looked with favor upon the formation of an association such as Wyatt had described (JA. 18-19; 134). One of the persons consulted by Hartley was Daniel Johnston, an economic advisor for the LSW. Johnston strongly favored formation of such an association because in 1962 the union had been subject to raids by other unions, principally the Teamsters. Accordingly, he was receptive to the Wyatt proposal as a means to check raids and piecemeal Board decertification

elections, and told Hartley that the idea was "exactly the thing that we were trying to accomplish." Johnston urged that the Union do everything to help it materialize (J.A. 19; 569-572, 604).

The Company representatives met on about February 27, and Wyatt, reporting the favorable reactions of both unions, recommended formation of an association (J.A. 19; 136-138). At this time, Simpson Timber and Scott Paper withdrew, not wishing to be bound to the results of association bargaining (S.J.A. 30, J.A. 19; 146). The six remaining companies nevertheless decided to form an association as soon as possible (J.A. 19; 147-148). Prompt action was necessary because the majority of existing contracts had a terminal date of June 1, and therefore it would be necessary for the association to propose contract changes ("openings") by April 1, in order to prevent automatic renewal of the contracts (J.A. 19-20; 148, 150).⁴ Moreover, as the companies were aware that the Unions would propose a 3-year contract term, Wyatt believed that the failure to form an association before the onset of negotiations would foreclose consideration of it until 1966 (J.A. 19; 148-150).

⁴ Customarily, contracts in the lumber industry, at whatever level negotiated, were signed by the locals and the particular employer or subdivision thereof (J.A. 12). These contracts were generally not completely renegotiated, but, rather, would remain in effect except to the extent that either party opened a particular subject for negotiations (J.A. 13; 148). Usually, there would be no bargaining on subjects not properly opened by 60-day notice to the other party (J.A. 13).

Accordingly, after several more meetings, a final draft of an agreement was approved on April 12 (J.A. 21; 148, 154-159). Wyatt called Nelson of IWA and informed him that the Association had apparently been formed and that "we are going to have one to bargain together" (J.A. 21; 159). He also told Nelson of the membership of the Association and established April 24 as the first date for negotiation between the Association and IWA (J.A. 21-22; 159-160). Wyatt also informed Hartley of LSW that the six employers had formed the Association and of their proposal to bargain with the Union on a multiemployer basis (J.A. 22; 160).

By April 22, representatives of the six employers had signed an agreement establishing the Association (J.A. 22; 167-168, RX 206).⁵ Each of the employers notified the

⁵ The agreement reads, in relevant part, as follows:

It is hereby agreed by and between the undersigned parties (hereafter referred to as the "Companies"):

Whereas, the Companies desire to:

1. Form a multi-employer association through which they will hereafter bargain collectively with labor unions which are duly authorized representatives of employees in the operations of the Companies listed in Exhibit "A", attached hereto and by this reference made a part thereof, and which may be amended from time to time.
2. Mutually assist one another in connection with the procedure, conduct and problems of such collective bargaining, and
3. Promote industrial peace, progress and stability through such collective bargaining.

(continued)

Unions, by means of a standard letter drafted at the April 12 meeting, that it was a member of "a voluntary multi-employer Association" to which it delegated "authority to bargain collectively . . . pertaining to all matters which involve the

5 (continued)

Now, Therefore, it is agreed as follows:

1. The Companies hereby join together as a voluntary multi-employer association for the purpose stated above.

* * * *

3. Subject matters which the Companies agree to submit to association bargaining will be all matters, pertaining to the wages, hours and other conditions of employment of the employees hereinabove mentioned, except:

a. Those matters which are of a local nature that do not have a general impact on the wood products industry if agreed upon by any individual company member of this association as a result of independent bargaining negotiations with any of such unions; and

b. Those matters which may have such a general impact, but which are specifically reserved from bargaining between this association and said unions by timely notice to and agreement with the unions involved.

4. Individual company members of this association may reserve to themselves for separate and individual bargaining such matters as are described in (3)(b) above by giving written notice of such reservation to each other member of this association before the association has given notice to the appropriate union of the matters upon which the association will collectively bargain and negotiate with such union.

(continued)

wages, hours or other conditions of employment of employees of this Company represented by your Union at such locations, other than the subjects of (1)pensions, (2) union security, (3) health and welfare, and (4) those issues . . . customarily

5 (continued)

5. After written notice is given by the association to the appropriate union as to matters upon which the association is authorized to negotiate, the Companies shall bargain collectively as a multi-employer association and each member company shall participate in such negotiations. Whenever any decision must be reached pertaining to such bargaining negotiations, a favorable vote of 75% of the association membership shall be required. Each member company shall have one vote.

6. Whenever negotiations between the association and authorized bargaining representatives of local unions pertaining to subjects of bargaining delegated to the association and to such union representatives, result in an agreement, subject to ratification by the union membership involved, all the collective bargaining agreements between the several association members and the affected local unions shall be amended and supplemented accordingly.

7. If as a result of negotiations on or with respect to subjects of bargaining delegated to the association, a strike is instituted by the union involved against any one or more of the association members or against any one or more of the operations listed in Exhibit "A", all other member companies of the association committed to such negotiations shall thereupon close the operations listed in Exhibit "A" in which the striking union is involved, in order to protect the entire membership of the association in its conduct of such bargaining negotiations. If a strike should occur against any member company or any of said operations during or as a result of negotiations on a matter described in (3)(a) or (3)(b) above, the other members of the

(concluded)

subject to local negotiations." As to these subjects, the employer stated that they were "specifically reserved and excepted from the delegation" of bargaining authority to the Association, but if properly opened, would be subject to negotiations "separate and apart" from any Association bargaining. Finally, the letter stated that "this Company through the Association desires to change the terms of the . . . existing agreements with respect to (i) hours of labor, (ii) overtime, and (iii) grievance procedure . . ." To each letter was attached a list of the company's operations for which the Association was authorized to bargain (J.A. 22-23, 25; 165-167, 172-173, RX 58-59, 98-99, 201, 205, 329-330).

D. Negotiations: The Unions accept the multiemployer unit by participating in negotiations with the Association

The Association's negotiating committee, composed of one representative from each company with Wyatt as

5 (concluded)

association shall not be deemed affected nor be required to close or suspend any operations by reason of such strike.

* * *

9. Any of the Companies signatory hereto may withdraw from the association formed hereby and terminate its membership therein by giving written notice by registered mail to all other member companies and to the appropriate union(s) prior to March 1 of any year.

[RX 206.]

chairman and spokesman, met with representatives of IWA during April, and with IWA and LSW negotiators separately during May and June.

NEGOTIATIONS: IWA AND ASSOCIATION

April 24 negotiations

At the first meeting between the Association and IWA on April 24, Wyatt opened the session with a statement reiterating the information contained in the standard letters announcing the formation of the Association and explained that the results of the negotiations would be binding upon all members (J.A. 27; 172-174, 491-492, 462, 511). Wyatt also noted the subjects which had been reserved for individual company bargaining (J.A. 27; 173). Nelson asked if the parties were to reach agreement on hours of labor would that preclude further negotiations at the local level, explaining that U.S. Plywood had made various openings on this subject⁶

⁶ Customarily, notices of company and union openings were made at the local plant or branch level. If the subjects were of general concern, they were negotiated at a higher level. Hence, in the case of IWA, local unions would delegate bargaining authority to their regional council; LSW locals would delegate to the district council, which in turn might redelegate to the higher regional council. At the higher level, the corporate or union representatives could only bargain on subjects specifically delegated to them (J.A. 20, 12-14). While the Association members approved a form of uniform openings at its March meeting, only Weyerhaeuser and International utilized it; the other companies made various openings at local branches which were not uniform (J.A. 20; 151-152). However, between April 12 and 22, all companies informed the Unions of standard openings by the Association (J.A. 22-25; RX 58-59, 98-99, 201, 205, 329-330).

(J.A. 27-28, 20; 173, 463). Nelson explained that he did not want to be put in the position, as had occurred in the past, of having to negotiate on the same subject at the local level after an agreement was reached with the Association (J.A. 28; 174, 462). The companies then caucused to discuss the U.S. Plywood openings (J.A. 28; 174, 463). After the caucus, Wyatt stated that there would be no renegotiation once an agreement was reached at the Association level; if there were local openings which conflicted, or were the same subject as decided by the Association bargaining, the Association settlement terms would govern (J.A. 28; 174). Nelson was unsatisfied with this explanation and asked for a statement as to which openings would be reserved for separate company bargaining (R. 28; 179, 463). Wyatt agreed to have the committee study the openings and report in the morning (J.A. 28; 183-184).

Each side then proceeded to elucidate their respective openings. Nelson outlined four IWA demands: (1) a 3-year contract term, (2) a general wage increase of 40 cents - 20 cents in 1963, and 10 cents in 1964 and 1965 - plus a "bracket increase" for skilled employees, (3) establishment of a committee to deal with problems of automation, and (4) travel time pay for loggers (J.A. 28-29; 174-175, GCX 54 pp. 2-3). Wyatt enumerated the Association's openings: (1) a contract adjustment to allow a 7-day, 3-shift operation without an automatic overtime penalty for Saturday and Sunday work, and the scheduling of maintenance employees other than Monday through Friday without Saturday overtime, (2) a provision prohibiting concerted refusals to work overtime, and (3) a requirement that grievants continue assigned tasks pending the processing of their grievances (J.A. 29-30; 176-179, 463, GCX 54 pp. 3-4).

April 25 negotiations

The parties again met on the afternoon of April 25, and Wyatt explained that the confusion on openings had occurred because the members of the Association did not have sufficient time prior to the April 1 deadline for openings to compare all of the local openings with those of the Association, and thus remove any overlap between the two (J.A. 30; 183). He promised that in the future any overlapping would be avoided by the Association (J.A. 30; 184, 391, 464-465, GCX 54 pp. 4-5). A U.S. Plywood representative stated that his company would be bound by any agreement reached between the Association and IWA, but that certain points on hours of labor would be reserved for local bargaining (J.A. 30; GCX 54 p. 5). Nelson replied that this appeared to be a departure from his statement of the previous day and asserted that all negotiations concerning the same subject matter should be conducted in the same place (J.A. 30; 465, GCX 54 p. 5). Pursuant to his earlier agreement, Wyatt then presented Nelson with the written proposals concerning the Association's openings (J.A. 30, 31; 465, 185, GCX 54 p. 5). After some discussion of these matters, Nelson requested that the Association consider the Union's contract proposals and clarify local versus Association openings (J.A. 31; 186, GCX 54 p. 5).

April 26 negotiations

At their meeting of April 26, Wyatt suggested that to resolve the problem of the U.S. Plywood openings on hours of labor, all of their openings together with the local union

openings on the same subject be brought in for bargaining on the Association level (J.A. 31, 187, 464-465, GCX 54 p. 5, RX 398). Nelson objected, however, to this proposal stating that the Regional Council had not been delegated authority to bargain about local openings (*ibid.*). Negotiations then continued with respect to travel time, grievance procedure and wage demands; however, no agreement was reached on these issues (J.A. 31-32; 189).

Following the parties' recess for lunch, Nelson rejected Wyatt's proposed solution of the U.S. Plywood problem, and suggested that a separate room should be set aside for local union officials and U.S. Plywood plant representatives to bargain and report results to the industry negotiators (J.A. 32; 472-473, RX 398). This proposal was rejected by the Association because U.S. Plywood was unwilling to bring its plant managers to the industry negotiations, an obviously unnecessary procedure since the Association had been authorized to bargain on its behalf with respect to local issues on hours of labor (J.A. 32 and n. 19; 473). Instead, Wyatt proposed that any of the necessary local union officials who were needed to resolve local openings be brought in to negotiate with Association representatives; the Union rejected this proposal (J.A. 32-33; 187, GCX 54 p. 5). Nelson suggested that the parties set aside this problem and proceed with the subjects which were clearly before them, and in disposing of the major issues, they could later deal with the hours of labor problems of U.S. Plywood (J.A. 33; 187-188, 473, GCX 54 p. 5). Thereupon, the parties entered into a discussion of other topics (J.A. 33; 473).⁷

⁷ There were no further discussions concerning the U.S. Plywood openings until June 18 (J.A. 475-476, 486).

April 29 negotiations

At the next meeting on April 29, the Association proposed a 3-year wage offer related to the current wage scale as well as a bracket increase (J.A. 33-34; 195, GCX 54 pp. 6-7). After caucus, Nelson indicated a qualified willingness to accede to the Association's 7-day workweek proposal but was un receptive to the other openings concerning grievances and overtime and rejected the wage offer as "far too little" (J.A. 34; 194-196, GCX 54 pp. 7-8).

Following a noon recess, the parties entered into comprehensive discussions of the various contract proposals made by both sides — workweek, grievances, overtime, automation, and travel time pay (J.A. 34; 198-199, GCX 54 pp. 9-10). In respect to wages, Nelson commented that the Association "must be intending to negotiate to a strike situation" which "would certainly occur" (S.J.A. 9a, J.A. 34; 199-200, GCX 54 pp. 7-8).

April 30 negotiations

At the meeting between the Association and IWA on April 30, Wyatt made a new wage proposal in addition to the same bracket adjustment previously offered (J.A. 34-35; 202).⁸ Following a luncheon recess, Nelson stated that while progress had been made, the wage offer was still inadequate, and that

⁸ If a disagreement arose on the application of the bracket increases, it would be resolved by a committee of the Association and IWA (J.A. 33-35; 202, GCX 54 pp. 7, 11).

there was no provision for automation or travel time. As to the latter, a reasonable formula would have to be reached before negotiations could conclude (J.A. 35; 203, GCX 54 p. 11). Nelson expressed willingness to draft language with respect to concerted refusals to work overtime (J.A. 35; 205-206, GCX 54 pp. 11-12). Finally, Nelson made a wage and bracket adjustment counterproposal; after an Association caucus, Wyatt stated that the parties' offers were too far apart. After some further discussions, during which Nelson again stressed wages and travel time, the meeting was adjourned subject to call by either party (J.A. 35; 205-206, GCX 54 pp. 12-13).

IWA strike preparations

Early in May, the local unions affiliated with IWA began to take strike votes. In a report to the local unions on May 2, Nelson outlined, *inter alia*, the progress of IWA's negotiations with "the new 'Association,' composed of six of the larger lumber companies,"⁹ and advised members that the strike votes would be tabulated on March 14; the balloting resulted in a vote in favor of a strike by a margin in excess of 7-1 (J.A. 36; RX 374-376). By letter of May 20, Nelson exhorted the locals to make preparations for a strike and to be ready to establish a picket line "in a matter of hours" (J.A. 36; RX 377).

⁹ Both Unions also referred to the Association in their communications to locals as the "Big Six" (J.A. 25, 35-36; 373, 391).

May 27 negotiations

When the negotiations resumed on May 27, both parties exhibited an unwillingness to make new offers. Nelson stated that if the last Association proposal was final, they "could only be interested in having a shutdown or a strike. . . [which] the Union could accommodate . . ." (J.A. 37; 210, GCX 55 p. 1). Wyatt rejected this suggestion, stating that "one of the very real reasons for forming this Association in the first place was to make a strike an outmoded thing . . ." (J.A. 37; 211). Following party caucuses, Nelson, rejecting the Association's second and third year wage offer as an "insult," stated that it would now bargain for a 1-year contract. The meeting was adjourned until the following day.

May 28 negotiations

Wyatt expressed the Association's preference for a 3-year contract and outlined a new proposal including wage and bracket increases, based on acceptance of the employers' openings (J.A. 37-38; 215-216, GCX 55 p. 3). While welcoming a return to a 3-year contract, Nelson criticized the Association's proposal for failing to deal with travel time and automation (J.A. 38; 216-217, GCX 55 p. 3). Following a caucus, Nelson agreed in principle to the Association's bracket proposal, contingent upon the list of classification and the amounts applied to each, as well as the number of employees in each classification (J.A. 38; 216, 218, GCX 55 p. 3). He also proposed a formula for travel time. In addition, Nelson asked for a permanent joint committee to study and make

recommendations to the Association and Union with respect to automation (J.A. 38; GCX 55 p. 3). Finally, he outlined a new wage proposal before the conclusion of the day's meeting.

May 31 negotiations

At this meeting Wyatt rejected the Union's previous contract proposal, and made a new offer on wages, agreed to establish a joint committee on automation and travel time, and dropped the employers' opening on grievances (J.A. 38; 220, GCX 55 p. 4). The Association adhered to its refusals to work overtime proposal (J.A. 38; 220, GCX 55 p. 4). In response to Nelson's question, Wyatt stated that this was the Association's final position, but added he was not saying "take it or leave it" (J.A. 38; 220, GCX 55 p. 5). IWA requested a recess until the morning of June 4 (J.A. 38; 220-221, GCX 55 p. 5).

June 4 negotiations

The parties met as planned on June 4. Nelson informed the Association that its last offer was inadequate, but that the IWA had no new proposals. The parties discussed the possibility of a strike, and Wyatt again reiterated his view that "a strike was the worst thing that could happen" (J.A. 38-39; 221-223, GCX 55 pp. 5-7). Nelson announced that it was discontinuing the negotiations since "this looks like . . . [an] impasse" (J.A. 39; 223, GCX 55 p. 7). Wyatt and Nelson met later privately to discuss the situation, and Wyatt indicated

that the members of the Association were bound by agreement to close down if any member were struck (J.A. 39; 224). As described *infra*, all of the St. Regis plants covered by the Association agreement and all but two of the U.S. Plywood's listed plants were struck by IWA and LSW the following day, June 5.

NEGOTIATIONS: LSW AND ASSOCIATION

May 9 negotiations

By arrangement of the parties, the first Association-LSW negotiating meeting was held on May 9 (J.A. 41; 294). LSW, through its local unions, had contracts with all of the Association members except Rayonier¹⁰ (J.A. 40; 294, RX 206 Exh. A). Wyatt was again spokesman for the Association; Earl Hartley and Daniel Johnston represented LSW (J.A. 41; 294-295). At the opening of the meeting Johnston announced that LSW was not recognizing the Association as a bargaining agency until it received certain information concerning the Association (J.A. 41; 295, GCX 59 p. 1, RX 400). He asked several questions about the structure of the Association, and Wyatt explained its formation and delegation of authority to bind its members; the Association would sign a settlement agreement and each member would sign separate contracts incorporating the results of the bargaining (J.A. 41-42; 295,

¹⁰ The Rayonier representative, while present at one of the early bargaining sessions, did not serve on the Association negotiating committee (J.A. 41 n. 24; 294).

302, 617, 646-647, 578, GCX 42; 369, 579, 646). Wyatt answered affirmatively Johnston's question as to whether the agreement establishing the Association provided that "a strike against one member is a strike against all" (J.A. 41; 302, GCX 59 p. 1, RX 400 p. 1). Wyatt also assured Johnston that the Association could bargain about union openings, with the exceptions set forth in the employers' letters to LSW (J.A. 42; 22-23, 582, GCX 59, p. 1). Johnston called attention to the absence of certain operations from the list of plants for which the Association would bargain. Wyatt explained that traditionally bargaining had been conducted separately for plants east of the Cascades, hence the exclusion of St. Regis operations at Klickitat, Washington, and Libby, Montana, as well as U.S. Plywood's Polson, Montana, plant (J.A. 42; 296-297, GCX 59 p. 1). Johnston stated that the LSW would be speaking for all its locals; it wished a unit that would protect the Union from raids by other unions or the siphoning off of individual plants by decertification (J.A. 43; 297, 580, GCX 59 p. 1, RX 400 p. 3). Thus, he explained that the Union wanted a "master agreement" inasmuch as LSW had been subjected to six Teamsters raids in 1962 (J.A. 43; 299-300, 580).

Following luncheon caucuses, Wyatt stated that the Association's bargaining authority was limited to a discussion of the subjects before the group exclusively for the plants listed by the members of the Association (J.A. 43; 581-583, GCX 59 p. 1, RX 400 p. 4). He explained that while members could not remove plants from Association bargaining, they might decide to bring in additional plants in the future (J.A. 43; 648-649, 646, RX 400 p. 4, GCX 59 p. 1). He also assured Johnston that the Association could bargain on all

issues, including a master contract, except those which had been specifically reserved (J.A. 43; 582, 670, RX 400 p. 4).

Since the parties were at loggerheads, Johnston decided that the Union committee should caucus in order to determine what action should be taken (J.A. 43-44; 582-583, RX 400 p. 5). For, as Wyatt had remarked to Hartley and Johnston, if the inclusion of the plants east of the Cascades was a "make-or-break situation" for the Union, the negotiations were concluded as there was no way to proceed on that basis (J.A. 44 n. 27; 304).¹¹ Following this caucus, Johnston announced that he would be representing all of the locals and that the Association would be speaking "for all, but three plants. We will agree to recognize you as an association for collective bargaining on wages and not only on your issues, but also our issues that we have or will present to you" (S.J.A. 5a n. 10; RX 400 p. 5, GCX 59 pp. 1-2). Wyatt replied that he understood the Union's position, but wanted it understood "that this association cannot speak for the plants excluded" (S.J.A. 5a n. 10, J.A. 45; RX 400 p. 6, GCX 59 p. 2). The St. Regis representative confirmed Wyatt's statement, remarking that "We will be speaking only for the plants listed [in the opening notice] and we will be willing to meet at Klickitat and Libby on the issues at those plants" (S.J.A. 5a-6a n. 10, J.A. 45; RX 400 p. 6, GCX 59 p. 2).

Hartley presented a letter, dated May 8, to the Company negotiators, outlining the Union's contract demands (S.J.A. 6a n. 10, J.A. 46; RX 400 p. 6, GCX 59 p. 2). The letter

¹¹ Wyatt also told them that he was expecting a telegram from St. Regis' New York office reconfirming its position; he later showed them the telegram (J.A. 44 n. 27, 48; 304, 306-307, RX 208).

notified the Association that Western Council had been authorized to represent the locals "in collective bargaining with the Multi-Employer Association, referred to as the "Association" and listed the locals currently represented at the Companies' operations (J.A. 46, 40-41; 583, RX 207).¹² The letter concluded, "As we begin meeting with your Association, it is our hope that you will join with us in a mutual objective of reaching a satisfactory conclusion to these negotiations" (J.A. 46; RX 207). Hartley, commenting that the parties had now "got rid of the technicalities," also presented a letter, dated April 11, which outlined conditions and problems in the lumber industry as justification for the LSW's contract demands (J.A. 46; 584, 656). Noting that "these changed circumstances in the industry can best be met by certain changes in collective bargaining approaches," the letter concluded by stating that "Joint multi-employer bargaining is a desirable approach to an overall industry problem, and we welcome an industry association or, in the absence of a formal association, a joint employer industry committee representing the major companies with which we hold contracts covering a majority of our members. We look forward to these joint bargaining sessions and are confident that the joint problems will be discussed and resolved on a mutual basis to the interest of all parties concerned" (J.A. 46; 584, RX 200).

Johnston then presented LSW's demands: joint Association-Western Council committees on automation and

¹² This letter, which was prepared on the day prior before the first bargaining session, listed the three excluded plants (J.A. 40-41; 575-576.

classifications; a change in pro-rata vacations for retired employees; a subcontracting clause; bracket adjustments for maintenance personnel; a 60-cent wage increase over a 3-year contract period; and a master contract (J.A. 46-47; 584, 586, 298-299, 301, 305, GCX 59 p. 2, RX 400 p. 6). With respect to the master contract, Johnston explained that this proposal did not contemplate renegotiating on all matters in one year, but that a sufficient number of items should be made uniform "to give us the protection of a unit against raids" and that the LSW was "flexible" as to what subjects would be included in the initial master contract (J.A. 47; 585, 305, GCX 59 p. 3, RX 400 p. 6). Wyatt commented on some of LSW's demands and outlined the Association's openings, which were the same as those previously made to IWA (J.A. 47; 303, 659-660, GCX 59 p. 3, RX 400 p. 7). Wyatt promised to consider the Union's demands and present the Association's proposals at the meeting scheduled for the following day (J.A. 659, RX 400 p. 7).

May 10 negotiations

When the parties met on May 10, Wyatt opened with a statement responding to each of the Union's demands (J.A. 47; 589, 661, 310, RX 401 p. 1, GCX 59 p. 4). While expressing disagreement with some proposals,¹³ Wyatt indicated

¹³ As to LSW's proposal for a master contract, Wyatt stated that as the parties in succeeding years reached agreement, the contracts would attain uniformity by evolution rather than revolution (J.A. 49; 379, GCX 59, p. 4).

that the Association was "completely sympathetic" to the problem of prorated vacation pay for retirees and that he thought that something could be worked out. He stated that there was "considerable merit" to the joint classification committee, and that the Association did not oppose the 3-year contract term and bracket adjustment proposals in principle (J.A. 591, 661-662, 310-312, RX 401 p. 1, GCX 59 p. 4). Wyatt then outlined the Association openings together with its wage and bracket adjustment proposals. Following a Union caucus to consider the Association's position,¹⁴ the LSW representative emphatically rejected the Association's openings as well as its wage proposals (J.A. 48; 589, 591, 664, 66 666-667, RX 401 p. 2, GCX 59 pp. 4-5). While LSW had gotten itself "into a jackpot because of the dual organization," they had taken care of that problem with an AFL-CIO "no raid agreement." He explained that he had been instructed

¹⁴ While there was some testimony that the question of excluded plants was discussed during the meeting, both Johnston and Wyatt admitted that in their recollections they may have mixed up the meetings of May 9 and 10 (J.A. 47-48; 588-589, 306, 307, 309-310, 313). In neither of the notes taken of this meeting by LSW and Association is there any reference to excluded areas, and statements which Johnston attributes to the May 10 discussion were in fact made at the May 9 meeting (J.A. 48; 589, GCX 59 pp. 1-5, RX 400 p. 5), RX 401, pp. 1-3). However, the subject was raised during the caucus when Wyatt showed Hartley the St. Regis telegram which reaffirmed its previous position that the Association was not empowered to bargain for its plants east of the Cascades (J.A. 48; 306-307, 589-590, 591, 668-669, 672-673, 631). What Hartley said at this juncture, however, is not apparent from the record (J.A. 48). The Board concluded, therefore, that LSW did not insist on bargaining with the Association only on the basis that plants east of the Cascades be included in the unit (J.A. 48).

to meet and talk with IWA, and that Nelson had informed him that "he is now taking a strike vote in answer to your proposal to that organization" (RX 401 p. 2). Unless the Association improved its offer, "you are going to get your smoke stacks cooled; [we] are going to shut you down" (J.A. 48; 667-668, 312, RX 401 p. 2, GCX 59 p. 5). Wyatt, protesting that strikes were not a good answer for either party, stated that the Association would continue to study the situation; he suggested that the negotiations be recessed until May 22, to which Hartley agreed (J.A. 48; 668, RX 401 p. 2, GCX 59 p. 5).

May 22 negotiations

When the parties met on May 22, neither would advance a new proposal, each taking the position that the initiative belonged to the other party (J.A. 48-49; 314, 316, 669, GCX 60 p. 1, RX 402 p. 1). Johnston, continuing his effort to obtain a master contract for unit protection, asked Wyatt whether the Association was empowered to execute a "joint agreement" (J.A. 49; 381-382, 671, RX 402 p. 1, GCX 60 p. 1). Wyatt denied that the Association lacked authority, but expressed its disinclination to do so. While they would settle as an Association, a uniform Association contract should, as he had previously indicated, come about by evolution rather than revolution through successive settlement agreements (J.A. 49, 81; 670-671, 381-382, GCX 60 p. 1, RX 402 p. 1). Thus, they were willing to enter into a settlement agreement which would include uniform contract language to go into all contracts (*ibid.*). Further discussion followed on the Union's classification committee proposal. Johnston asked

if this would be a function of the Association or individual companies. While observing that he was not aware that the Association had made any proposal respecting a classification committee, Wyatt stated that he was not opposed to the Association approach which would be included in an Association settlement rather than an Association contract (GCX 60 p. 1, RX 401 pp. 1-2). After further discussion on vacation pay for retirees, and a protracted dialogue on wages both before and after the parties caucused, Hartley announced that he had notified the Federal Mediation and Conciliation Service and that the Union was willing to meet at any time (J.A. 50; 316, 669, GCX 60 p. 2, RX 402 p. 2).

June 3 negotiations

The parties again met on June 3 under the auspices of the FMCS. The meeting began with Hartley and Wyatt reviewing their respective positions and contract proposals as had evolved to date (J.A. 50; 317-318, 320, 382, 674-676, GCX 61 p. 1, RX 403 p. 1). Johnston stated that "we think there is value to a big six association and we would like to solidify this Association by a master agreement" (J.A. 50-51; 320, 322, GCX 61 pp. 1-2, RX 403 p. 1). However, he again questioned the Association's authority to negotiate such a contract (Tr. 318, 595, RX 403 p. 2, GCX 61 p. 3). Wyatt reiterated that the Association did have authority and was limited only in the four topics outlined at the first bargaining session, but that the members were unwilling to attempt to write a master contract in one year's bargaining (J.A. 51; Tr. 383, 385, RX 403 p. 2). Johnston then proposed that the Unions would drop the master contract if the Association in turn would abandon

its 7-day week straight time rate proposal; Wyatt rejected this proposition (J.A. 51, 50 n. 31; 320, 595, 678, GCX 61 p. 3, RX 403 p. 3).

The parties then met separately with the mediator (J.A. 51; RX 403 p. 3, GCX 61 p. 4). Upon returning, Wyatt made a new proposal on behalf of the Association, including, *inter alia*: agreement to Association-level automation and classification committees, and increased wage and bracket proposals (J.A. 51; 321-322, 595, 681, GCX 61 pp. 4-5, RX 403 pp. 3-4). After discussing this proposal, the Union caucused; upon its return, Hartley rejected the Association offer (J.A. 51; RX 403 p. 5, GCX 61 p. 5). Commenting that the wage proposal was insufficient, Hartley remarked that the parties were at an impasse, and that the Union was going to "take economic action against some but not all of the companies or plants involved" (J.A. 51; 682-683, 684-685, 319, 322, RX 403 p. 5, GCX 61 p. 5). The meeting, most of which was devoted to a discussion of wages, was adjourned without plans for another session (J.A. 51; 680, 683, GCX 61 p. 5).

Later that evening, Wyatt met with Hartley and Johnston privately at the latters' invitation for off-the-record discussions on what could be done to break the deadlock (J.A. 51; 596, 685, 406, 323-324). Hartley told Wyatt that there would have to be a substantial increase in the Association's offer — they would have to "open up the purse strings" — to avoid a strike (S.J.A. 9a, J.A. 51; 325, 685). Johnston asked if the other members of the Association would lock out in response to a strike against some companies and if he thought that this action would be legal (J.A. 51; 325, 407-409, 596-597). Wyatt answered that the members were bound to do so by agreement but that he was unsure at that time even what his

company would do. However, there would be a meeting of the Association, presumably to decide upon a course of action. As to the legality of the lockout, Wyatt replied that their attorneys thought that it would be proper (*ibid.*).

That same evening, Hartley and Johnston went to see Otis Hallin, vice president of Crown Zellerbach, and questioned him about rumors of a possible lockout if the Union struck U.S. Plywood and St. Regis, and whether in that case Crown Zellerbach would lock out. Hallin replied that they were committed to lock out if the other companies did likewise, but that the Association would be meeting on June 5 (J.A. 52; 597-598).

E. The strike and lockout

Despite the possibility of a lockout, LSW's executive board was determined to utilize a strike in order to gain a substantial wage increase (J.A. 52; GCX 42 p. 61). Accordingly, on June 5, all of the St. Regis plants covered by the Association agreement and all but two of U.S. Plywood's listed plants were struck by IWA and LSW (J.A. 52 and n. 33; 224, 327-328). Representatives of LSW and IWA on June 3 had jointly decided to strike in the event that their separate meetings with the Association on June 3 and 4 produced no settlement (J.A. 54 and n. 34; GCX 42 pp. 60, 62-63, RX 395). On June 5, both Unions informed their respective locals of their strike plans. Hartley stated "The negotiations with the Big Six reached an impasse and economic action is the only method left to achieve your wage demands."

Accordingly, a strike would commence "at some plants" at noon that day. He also informed them that the companies "which are members of the Big Six Association, have agreed amongst themselves to lock us out if we strike any one plant or company" (J.A. 53; RX 391).

The IWA, by letter of the same date, stated, *inter alia* (J.A. 53; RX 378):

In order to make the Strike as effective as possible, the Negotiating Committee and Executive Board have elected to Strike certain selected Companies at first and then extend it from time to time as circumstances and good strategy dictates [sic]. This, we believe will be the most effective method to obtain an industry wide settlement, in the shortest time with the least sacrifice by the members.

* * *

We close by pointing out that this is a Strike to bring about an industry wide settlement. The method is only for strategic purposes. "The contributor today, may be a recipient tomorrow."

That afternoon, Wyatt called a meeting of the Association members to ascertain what operations had been struck and the cause of strike. Having determined that the strike was called to obtain benefits sought during the previous negotiations between the Association and the two Unions, the four unstruck companies decided to close down the listed plants pursuant to paragraph 7 of the Association agreement (J.A. 54; 227-231; *supra*, p. 5, n. 10). The shutdown

began on June 7 and continued until early August (J.A. 54).¹⁵

F. Post strike settlement negotiations

On June 13 and 14, the Unions filed unfair labor practice charges with the Board alleging violations of Section 8(a)(1) and (3) of the Act (J.A. 6-7, 55). The Federal Mediation and Conciliation Service arranged for separate meetings between the Association and the two Unions on June 18 (J.A. 55; 236-237). In the first meeting, Wyatt and Nelson of the IWA met for 2 hours with the mediator (J.A. 55; 237-238). They discussed at length the issues which were separating them, including wages, hours of labor and travel time (J.A. 55; 239-245, RX 353). Nelson indicated that he would like to reach a settlement with the Association to establish a pattern in the industry (J.A. 55; 243, 540, RX 353, pp. 7-8).

Later that morning, another mediator met with Wyatt and Hartley of LSW (J.A. 56; 328, RX 358 p. 1). Hartley stated that all that was needed was for Wyatt and the Association to loosen up the purse strings and the problem was to make Wyatt more influential in the offices of top management of the various companies (J.A. 56; 329, RX 358 pp. 1-2). Hartley indicated that the Union wanted 35 cents over

¹⁵ Notices were given on June 5 and 6 to the employees and press informing them of the shutdown for the purpose of protecting the interest of the group against the Unions' selective strike (J.A. 54; 225, 231-236, RX 210, 28, 31, 100, 100A, 161, 162, 176, 177, 211).

a 3-year period (J.A. 56; RX 358 p. 2). Wyatt replied that no employer movement was possible on that basis, and that, if anything, the employers' position had firmed up since the strike began. This attitude resulted from the Union's tactics of filing an unfair labor practice charge which indicated that it was their intention to "clobber the Big Six right off the bat" (J.A. 56; 330, RX 358 p. 2). Hartley replied that he had no intention to disturb the relationship with the Association or cause it to go out of existence, and that he had thought from the beginning, and still thought, that it was a good thing for the industry. He explained that the filing of the unfair labor practice charges was nothing but a "tactic" to "give the boys something to think about during the strike, and that it was just that and that shouldn't stand in the way of our getting together." He said that he did not care anything about the charges, "but that it did keep the boys busy while they weren't working" (J.A. 56; 330-331, RX 358 pp. 2-3). After a further discussion of economic matters, Hartley remarked that another meeting prior to July 10 would not be of much value but he was willing to meet if the mediator called a meeting; a tentative agreement was reached to meet on June 29 (J.A. 57; 332, RX 358 p. 4). The meeting was concluded with Hartley remarking that he did not wish to do anything to disturb the Association (J.A. 57; 332, RX 358 p. 6).

Committees of the Association and IWA, together with Hartley and three other LSW representatives as observers, met on June 27 and each side stated its position on the issues (J.A. 57; 245-247, GCX 56). Nelson again raised the previous objection to U.S. Plywood's conflict of openings with respect to hours of labor. U.S. Plywood indicated, as it

previously had, that it would be bound by an Association-negotiated settlement on all of its hours of labor openings that covered the same general position as the Association's and that the company would meet with the locals on hours of labor which were distinct from the Association's opening. Nelson rejected this proposal, reiterating his position that the IWA would not negotiate hours of labor at more than one level (J.A. 57; 479-480, 392-393). But in referring to this problem when he wrote to all of the IWA locals on July 1, he indicated the Union's apparent agreement with U.S. Plywood's proposition:

The Union Negotiating Committee also reminded the Employers' Committee that in the case of U.S. Plywood Corporation, there were Hours of Labor openings which were being sought by the Association Committee and at least in one case, the Local Union likewise had openings on the Hours of Labor provision.

In reply to this, U.S. Plywood suggested that we enter separate negotiations at the Local Branch Level on the Hours of Labor opening provisions other than those being discussed by the Association Committee. Time permitting, we shall attempt to arrange some such meetings. [RX 382 p. 2.] [¹⁶]

¹⁶ After referring to LSW negotiations with the Association and its role as observer during the IWA-Association meetings, the letter stated that the negotiating committees of both Unions "will meet jointly right after the 4th of July to discuss the advisability of extending the picket lines to other operations" (J.A. 58 n. 38; RX 382 p. 3).

The next meeting between the Association and LSW on July 1 was also attended by Nelson and two IWA representatives as observers (J.A. 59; 335-336).¹⁷ Johnston stated that the LSW was not "willing to meet for bargaining purposes with an association that refuses to settle on all issues for all of our plants on a contract" and that "unless the companies are willing to negotiate on a [master] contract then we refuse to recognize them as an association but we will meet with them as separate companies" (J.A. 60 n. 39; RX 404 p. 2). Johnston again questioned the Association's authority to negotiate a master contract (J.A. 60; 337, RX 404 p. 2). Wyatt replied that the Association had authority to bargain for an agreement binding on all companies, and to negotiate an Association contract if they considered it desirable. The companies, he said, had been meeting with the Union throughout the negotiations on an association basis, they were there that

¹⁷ On June 28, Hartley separately wrote to each company requesting that it set a date for bargaining "on all issues open for negotiations between us this year. We will, of course, treat with any agent that you may designate for such bargaining." The letter further stated that the companies' employees would be willing to work "until an impasse has been reached in bargaining with your company as their employer" if the Company would "terminate your existing unlawful shutdown at your plants." At the bottom of the letters were listed the plants of the respective companies; there was no reference to the excluded plants of St. Regis east of the Cascades. The letter to U.S. Plywood, the only other company with plants in that region, was not introduced into evidence (J.A. 58-59; RX 213). These letters were not delivered until July 1, when the companies' representatives were in Portland for negotiations, and therefore were not seen by them until their return from this meeting (J.A. 59; 334-335).

day only as an association, and unless the Union was willing to meet with them on that basis, there was nothing to discuss (J.A. 60; 337-338, 559, RX 404 p. 2). Johnston replied that "we do not take the position that we will not meet with an association for the purpose of negotiating a contract, but we will not negotiate just on certain issues" (J.A. 60; RX 404 p. 3). After the mediator met separately with the parties, the mediator stated that he had been instructed by the Union to say that it was willing to listen to any change in the Association's contract proposals (J.A. 61; 338, 691-692, RX 404 p. 3). Wyatt then modified the Association's offer by dropping its request for a Tuesday-Saturday workweek, and modified its 7-day workweek proposal (J.A. 61; 338-339, 690-691, 692-693, RX 404 p. 3, GCX 62 p. 2). The meeting ended subject to call (J.A. 61; RX 404 p. 4, GCX 62 p. 4). Johnston distributed letters to the representatives of the various companies in sealed envelopes, which Wyatt did not read until after the meeting had ended (J.A. 61; 340, 342, 688-690). The letter, signed by Hartley, stated that the Union was dealing with the Association as an agent of each of the employers, that the Association was not an appropriate multi-employer bargaining unit, and that the Union did not consent to the exclusion of subject matter and plants as theretofore indicated by the Association (J.A. 61; RX 214, 215). Subsequently, the companies responded to the Union's letters of June 28 and July 1, and rejected the Union's "self-serving effort to support the unfair labor practice charges" (J.A. 61; 342-343, RX 216-219).

On July 9, Nelson arranged an evening meeting with Hartley, Wyatt, and two Association representatives. After some discussion of the Unions' contract proposals, an

Association representative remarked that the Unions were attempting to prevent the Association from succeeding as an entity. Nelson replied that this was not the case. Rather, "as I have said before, I don't mind saying it again, we think this was a desirable move" and "it is too bad that it got into trouble the first year." The parties agreed to meet at a later date (J.A. 62; 248-251).

Representatives of both Unions met with the Association on July 15 with the mediator (J.A. 62; 251-252, RX 383, GCX 57). Nelson read a statement on behalf of the IWA to the effect that the Union had never considered the Association as a multiemployer bargaining unit, but that it recognized the Association as the bargaining agent of each of the companies (J.A. 63; 252-253, RX 163, 383). Hartley then read his letter of July 1 (J.A. 63, 253, RX 383 p. 1). The Association caucused, and upon its return, Wyatt gave the Unions a handwritten statement prepared during the caucus, to the effect that it was willing to continue meeting only on an Association basis (J.A. 63-64; 254-255, RX 383 pp. 1-2, RX 164). After Wyatt stated that he was hesitant to proceed, Nelson commented that all three statements were self-serving, and that negotiations could continue without any party accepting the other's position (J.A. 64; 255, RX 283 pp. 2-3, GCX 57 p. 1). After a short Association caucus, Wyatt outlined a new offer, including an increase in wages which the Union rejected after further discussion and a caucus (J.A. 64; 255-259, RX 383 pp. 3-6, GCX 57 pp. 2-5, RX 38-39).¹⁸

¹⁸ On July 19, Nelson outlined the Association's proposal in a letter to the IWA members; no mention was made of any Union effort to break off negotiations with the Association in order to bargain separately with the member companies (J.A. 64; RX 385).

After a meeting of the executive committee of the Association on August 2, Wyatt notified each Union by letter of August 4 that work would be resumed at operations of all Association members on August 7, employees to be paid on the basis of wages of May 31, and as modified by the Association's offer of July 15. The letters requested that the Unions notify the Association of their position within 10 days, and stated that the contents of the letters — with the exception of the notice of resumption of work — would not be revealed to the employees or public until after the Unions had had an opportunity to consider it between then and August 15 (J.A. 65; 263-266, 269-270, RX 220-221).. The Association released a press announcement on August 5 to the effect that the Association would resume work on August 7; no mention of the applicable wage rate was made (J.A. 65; 266-269, RX 362 A, 363).

After unsuccessful meetings between August 2 and 12, the last meeting of the parties was held on August 13 when Wyatt made a new settlement proposal on behalf of the Association. After further discussion and modification a final settlement was reached, including a 30.5 cent wage increase over 3 years, a bracket increase, a provision regarding concerted refusals to work overtime, joint Association-Union automation and classification committees, pro-rata vacation pay, travel time differential to be applied by a joint Association-Union committee, and an agreement to close out local issues, with the exception of specified subjects (J.A. 65-67; 261-263, 271-288, GCX 58 pp. 2, 7, RX 405, 406.

407, 222, 225).¹⁹ In its final form, the settlement was signed by Wyatt for the Association, and by Nelson (IWA), and Hartley (LSW); the agreement was subsequently ratified by the Unions' locals (J.A. 66-67; 481, RX 222 p. 6).

II. THE BOARD'S CONCLUSIONS AND ORDER

In its Supplemental Decision and Order the Board affirmed the Trial Examiner's recommended decision in the original proceeding (J.A. 92-93), that the six companies comprising the Association had effectively formed a multiemployer bargaining unit which was accepted by the Unions in the course of bargaining, and that the lockout by intervenors, following the Unions' strike against the two members of the unit, was a lawful defensive act against a whipsaw strike sanctioned by the Supreme Court's decision in *N.L.R.B. v. Truck Drivers Local Union No. 449, Teamsters (Buffalo Lines)*, 353 U.S. 87. Additionally, as in its prior decision, the Board found that even assuming that a multiemployer unit had not been formed, or accepted, the employers nevertheless bargained through the Association as a joint spokesman, agreeing to be bound by any settlement reached, and that the Unions having made common demands through the Association, struck two of the employers after a bargaining

¹⁹ The reserved local subjects included pensions at Weyerhaeuser and St. Regis, agency shop and the unclosed 1961-1962 bargaining between an LSW local, both at Weyerhaeuser. U.S. Plywood local hours of labor was closed out by the settlement agreement (J.A. 67 n. 44; 480-481, RX 225).

impasse for the purpose of securing common terms from all of the employers. In these circumstances, each of the non-struck employers was entitled to, and did, lock out its employees to advance its own bargaining position after an impasse. Since the lockouts served a legitimate employer interest, and were not inherently prejudicial to statutorily protected rights, the Board concluded that the intervenors' action in locking out their employees, when judged in light of the principles set forth by the Supreme Court in *American Ship Building Company v. N.L.R.B.*, 380 U.S. 300, and *N.L.R.B. v. Brown*, 380 U.S. 278, was not violative of Section 8(a)(3) and (1) of the Act. Accordingly, the Board adhered to its original holding dismissing the complaint in its entirety (S.J.A. 12, 7a-12a).

SUMMARY OF ARGUMENT

I.

The four intervenor companies, together with two other companies, formed the Association and delegated to it binding authority to bargain and reach settlement on their behalf in negotiations with the two Unions. At the commencement of negotiations, each Union was informed of the Association's authority to bind its members, and thereafter bargained with the Association in an attempt to secure common terms from all of its members. After declaring an impasse in the negotiations, the Unions struck two of the employer-members in the hope that this would be the most effective device to secure a common settlement from all the companies. The

intervenors, believing that the parties had consensually formed a multiemployer bargaining unit, locked out their employees to preserve the solidarity of that unit from the whipsaw strike, and to support the Association's bargaining position which was common to each of its members. The record shows that the employers in the Association had formed a multiemployer bargaining unit by committing themselves to being bound on a group instead of an individual basis. The Unions in the course of negotiations consented to the multiemployer unit. Accordingly, the lockout here was lawful defensive action under *Buffalo Linen Supply Co.*, 109 NLRB 447, affirmed *sub nom. N.L.R.B. v. Truck Drivers Local Union 449*, Teamsters, 353 U.S. 87; *N.L.R.B. v. Brown*, 380 U.S. 278.

II.

The intervenors' lockout was lawful even if the parties had not created a formal multiemployer bargaining unit. Absent independent evidence of an unlawful purpose, an employer may use a lockout to advance his bargaining position following an impasse in negotiations with a union representing his employees. When there is no evidence of unlawful motivation, a bargaining lockout is not inherently prejudicial to statutorily protected employee rights if the lockout serves a legitimate employer business purpose. *American Ship Building Company v. N.L.R.B.*, 380 U.S. 300. Such a purpose is served where, as here, employers and unions bargain jointly for common contract terms, and the unions, through the use of a whipsaw strike, seek to increase the cost of the common settlement beyond that offered by the employer group.

The lockout permitted by the impasse is not unlawful merely because, as the Board found, the intervenors stated it was for the purpose of preserving the solidarity of an assumed multiemployer unit against a whipsaw strike rather than stating it was to advance their bargaining position, since the stated reason involves no purpose proscribed by the Act. Moreover, a purpose to preserve the solidarity of employers against a union's attempt to break an impasse by use of a whipsaw strike clearly has the underlying objective of advancing the employers' common bargaining position. Thus, the record in the instant case establishes that the lockout had a purpose of ending the impasse on terms favorable to the intervenors' contract demands.

III.

The instant case raises no issue of whether, in view of the Supreme Court's holding in *United Mine Workers v. Pennington*, 381 U.S. 657, the Board should invalidate a lockout where a union and an employer in one bargaining unit bargain and attempt to force a settlement respecting working conditions in another unit, with a purpose of controlling the market by eliminating smaller competitors. Like the employers' conduct held lawful by the Supreme Court in *Buffalo Linen, Brown Food, and American Ship*, this case concerns bargaining and locking out by employers solely to force unions representing their employees to accept the employers' proposal for a contract covering only their bargaining units.

There is no merit to the contention that the intervenors were neutral to the dispute between the Unions and

struck employers, and that their lockout should be deemed analogous to unlawful union secondary boycotts. The evidence shows that the intervenors did not lock out their employees merely because they were sympathetic to the plight of the struck employers; rather, they were legitimately resisting the Unions' attempt to achieve substantially more favorable common contract terms from every employer by striking each *seriatim*. Accordingly, the intervenors' lockout cannot be rendered unlawful merely because they had the additional effect of supporting the bargaining position of other members of the Association.

ARGUMENT

I.

THE BOARD PROPERLY FOUND THAT THE UNIONS AND
EMPLOYERS CREATED A MULTIELPLOYER UNIT AND
THAT THE INTERVENORS' SHUTDOWN OF THEIR PLANTS
IN RESPONSE TO THE UNIONS' STRIKE OF TWO
EMPLOYERS IN THE MULTIELPLOYER UNIT WAS LAWFUL
ACTION UNDER THE BUFFALO LINEN CASE

Pursuant to the Court's remand, the Board reached the question which it found unnecessary to decide in its prior decision, and sustained the Trial Examiner's finding that the employers established, and the Unions accepted, a multiemployer bargaining unit (S.J.A. 2a-3a, 6a-7a). On the basis of this finding, the Board concluded that the intervenors were entitled to lock out their employees in response to the

Unions' selective strike against two other members of the Association. *N.L.R.B. v. Truck Drivers Local Union No. 449 (Buffalo Linen)*, 353 U.S. 87. While in their brief the Unions challenge the Board's underlying factual findings, they do not contend that it improperly applied the *Buffalo Linen* doctrine if, as we show below, the employers created, and the Unions accepted, a multiemployer bargaining unit.

A. The employers formed a multiemployer bargaining unit

As this Court has recognized, a multiemployer unit is "nonstatutory in character, and thus lacks the definiteness in terms of nature and obligation which it might have if Congress had dealt expressly with it." *Retail Clerks Union No. 1550 v. N.L.R.B.*, 117 U.S. App. D.C. 336, 338, 342, 330 F. 2d 210, 212, 216, cert. denied, 379 U.S. 828. Since group activity ranges over "a wide spectrum of habits, practices, and understandings, explicit and implicit" (*id.* at 342, 216), the Board must look beyond formalities to the actual intent of the parties, inasmuch as multiemployer bargaining is "a voluntary arrangement, dependent upon the real consent of the participants to bind themselves to each other for bargaining purposes." *Van Eerden Company*, 154 NLRB 496, 499.

Thus, for example, "[n]either the lack of a formal association of employers nor the fact that the employers have not given their designated representative final authority to bind them, precludes the establishment of a multiemployer unit." *Bellingham Automobile Dealers Ass'n*, 90 NLRB 374, 375-376 and n. 6. Accord: *Balaban & Katz (Princess Theater)*, 87 NLRB 1071, 1073; *Cleveland Builders Supply*

Co., 90 NLRB 923, 924; *American Publishing Corp.*, 121 NLRB 115, 119, 121; *The Evans Pipe Co.*, 121 NLRB 15, 17; *Quality Limestone Products, Inc.*, 143 NLRB 589, 591 and n. 13; *The Kroger Co.*, 148 NLRB 569, 573. See *Retail Clerks Union No. 1550 v. N.L.R.B.*, *supra*, 117 App. D.C. at 338, 330 F. 2d at 213. Compare, *N.L.R.B. v. Coletti Color Prints, Inc.*, ____ F. 2d ____ (C.A. 2), No. 33, December 1, 1967 (66 LRRM 2776, 2780). Similarly, the incorporation of the results of the joint negotiations into separate uniform contracts rather than a single unit-wide document is not controlling. *Balaban & Katz*, *supra*; *The Evans Pipe Co.*, *supra*; *Safeway Stores, Inc.*, 148 NLRB 660, 670. See *Retail Clerks Union No. 1550 v. N.L.R.B.*, *supra*, 117 App. D.C. at 338, 330 F. 2d at 213. Finally, as held here (J.A. 82-83), a history of bargaining on a multiemployer basis is not a prerequisite to a finding that the parties have created a multiemployer unit. See *Western Ass'n of Engineers, Architects & Surveyors*, 101 NLRB 64; *Safeway Stores, Inc.*, *supra*, 148 NLRB at 670.

The Board, rather, has consistently held that the essential ingredients are that the "members of the group have indicated from the outset an unequivocal intention to be bound in collective bargaining by group rather than individual action," and that the unions have assented and entered into negotiations with the employers on this basis (S.J.A. 3a). See, *Van Eerden Company*, *supra*, 154 NLRB at 499; *The Kroger Company*, *supra*, 148 NLRB at 573. The Board concluded that the employers here had formed, and the Unions accepted, a multiemployer unit. The Unions have not shown that the Board abused the wide discretion normally accorded to it in determining appropriate bargaining units. Accordingly, we submit

that the Board's conclusion is entitled to affirmance.

N.L.R.B. v. Friedland Painting Co., 377 F. 2d 983, 987 (C.A. 3). Accord: *Retail, Wholesale & Department Store Union, AFL-CIO, et al. v. N.L.R.B.*, ____ U.S. App. D.C. ___, 385 F. 2d 301, 305. See also, *Buffalo Linen*, *supra*, 353 U.S. at 95-96.

As set forth in the Counterstatement, prior to 1963 the intervenors had bargained separately with IWA and LSW and their respective locals. However, in early 1963 the intervenors, together with St. Regis and U.S. Plywood, agreed to seek common contract terms from both Unions. To achieve this purpose the six employers decided to form a multiemployer association to bargain on their behalf with the Unions. Wyatt, the chosen spokesman for that association, explained the plan to the Unions' chief spokesmen, Nelson (IWA) and Hartley (LSW). After discussion with local officials, both agreed to the proposal. Accordingly the Association was formed. From April into June, Wyatt engaged in lengthy and comprehensive negotiations with the Unions. Both sets of negotiations culminated in an impasse over wages and other terms of employment. Following the Unions' selective strike against St. Regis and U.S. Plywood, and the intervenors' responsive lock-out, the Association and the Unions agreed upon and executed a multiemployer agreement binding on all six employers.

The Unions assert, however, that this consensual group bargaining was not really bargaining as a multiemployer unit, for the record allegedly shows that the employers' creation of the Association "was but a device for simultaneous negotiations with individual employer authority reserved in numerous ways, rather than a body with fully delegated power to settle contract terms binding on its members" (Un. Br. 55). But

the record demonstrates that the six companies had made the necessary commitment to treat their employees as one comprehensive unit and to be bound on a group basis. Indeed, two prospective members of the Association, Simpson and Scott, withdrew out of an unwillingness to make such a commitment (*supra*, p. 7). The binding nature of the Association was revealed to both Unions. Thus, even before bargaining commenced, Wyatt informed Hartley that the Association intended to bargain on a multiemployer basis, with any settlement reached to be binding on all of its members (*supra*, pp. 6, 8). In standard letters sent to both Unions, each company stated that it had delegated to the multiemployer Association the authority to bargain collectively with respect to all matters, other than certain specified subjects (*supra*, pp. 8-11).²⁰

At the Association's first meetings with the Unions on April 24 and May 9, respectively, Wyatt explained that the results of the negotiations would be binding on all members

²⁰ The exclusion of pensions, union security, health and welfare, and issues customarily subject to local negotiations from the members' delegation of bargaining authority (see Un. Br. 11-12, 53) is not inconsistent with the establishment of a multiemployer bargaining unit. *The Kroger Co.*, *supra*, 148 NLRB at 573 and n. 6; *Retail Clerks Union No. 1550 v. N.L.R.B.*, *supra*, 117 U.S. App. D.C. at 342, 330 F. 2d at 216, enforcing, 141 NLRB 564, 568; *N.L.R.B. v. Spun-Jee Corp.*, 385 F. 2d 379, 383 (C.A. 2). Moreover, in proposing the formation of the Association to Nelson and Hartley, Wyatt specifically mentioned these exclusions, and both indicated that this would create no problem (*supra*, p. 6). During the negotiations both Unions agreed to these exclusions and made no attempt to bargain with the Association concerning these matters (S.J.A. 4a, J.A. 75-76; 456, 485, 524-526, 131, 653, 639, 641-642).

(*supra*, pp. 12, 20). The Unions do not dispute that these statements were made. They assert, however, that, at least with respect to the IWA negotiations, the delegation of authority to the Association was impugned by U.S. Plywood's opening locally at some of its plants on hours of labor, a topic which the Association had also opened for all the members (Un. Br. 9-10, 53, 58). It is true, as the Board recognized, that there appeared to be a possibility of conflict on hours of labor openings since U.S. Plywood had notified several local unions in late March that it desired to open on this subject, and in its standard letter of April 18 to the Unions it had delegated bargaining authority to the Association on the same subject (J.A. 20, 25, 78; RX 35g, 36c, 37c, 38c, 39c 329, 330). Wyatt forthrightly explained that this seeming conflict had occurred because of a shortness of preparation time, and would not recur in the future (J.A. 30-31). In order to meet Nelson's objection that he would be forced to renegotiate the same subject at different levels, Wyatt made clear, with U.S. Plywood's concurrence, that any agreement reached between the Association and IWA would be controlling. When this was unsatisfactory to Nelson, Wyatt even offered to negotiate all of U.S. Plywood's hours of labor openings on the Association level, bringing in the local union representatives and thereby eliminating the question of IWA's authority to speak for its locals on these matters (*supra*, p. 15; J.A. 78-80, 30-33). While Nelson rejected this offer, he nevertheless proposed that the matter be put aside so that the parties could concentrate on the substantive issues, suggesting that in resolving these, a solution might be found for this problem (J.A. 33; 473, 187-188, GCX 54 p. 6). It was not until after the Unions had filed the unfair labor practice charges that Nelson

again raised the issue, and at that time he was apparently satisfied to discuss nonconflicting hours of labor openings with U.S. Plywood on a local level (*supra*, p. 33).

From the foregoing it is clear that far from negating the Association's "binding quality," the Association's offer to reach a final settlement on even U.S. Plywood's local openings corroborates Wyatt's statement that he was representing a fully bound organization, and flatly refutes the Unions' assertion that "the question of Association authority to act as a binding agent" was set aside, and "no agreements were reached . . . on Association authority prior to the lockout itself" (Un. Br. 10).

Finally, the Unions contend that any single member could veto an Association contract proposal, and that therefore the Association lacked "the power to bind individual employers which is necessary for the creation of a multiemployer unit" (Un. Br. 55-56, 6, 11, 54). In support of this contention, they rely upon portions of Wyatt's testimony in a California Unemployment Compensation hearing where he mistakenly stated that one negative vote could defeat a proposal. However, thereafter, during the same hearing, Wyatt corrected himself and explained that two negative votes would be required (GCX 42 p. 92). His explanation for his erroneous testimony was credited by the Examiner at the unfair labor practice hearing (J.A. 71; 439-443, *infra*, Appendix).

Moreover, the actual conduct of the negotiations confirms that the Association's 75 percent rule did not give one employer the veto power alleged by the

Unions.²¹ On two crucial votes when the Association agreed to drop its hours of labor proposal, and when it accepted the IWA's counterproposals, Weyerhaeuser was effectively outvoted by the other members of the Association (J.A. 273-274, 281-282). Thus, as the Board found, "it is quite clear that at least two negative votes were required to defeat a bargaining proposal" (S.J.A. 4a).²² In these circumstances, we submit, the Board could properly find that the employers "indicated from the outset an unequivocal intention to be bound in collective bargaining by group rather than individual action," and that they notified the Unions of the formation of the group and the delegation of binding bargaining authority to

²¹ Paragraph 5 of the Association agreement reads as follows:

After written notice is given by the association to the appropriate union as to matters upon which the association is authorized to negotiate, the Companies shall bargain collectively as a multiemployer association and each member company shall participate in such negotiations. Whenever a decision must be reached pertaining to such bargaining negotiations, a favorable vote of 75% of the association membership shall be required. Each member shall have one vote. [Supra, p. 10 n. 5.]

²² The Unions' quote selected portions from the various drafts of the Association agreement which were circulated among the members before the final agreement was concluded. Assertedly some significance should be attached to the companies' abandonment of initial proposals, such as one under which decisions would be made by a majority vote (Un. Br. 6-7, 54-55). Whatever may be said of the relevancy of these working papers, the central fact remains that the final agreement provided for, and the Association actually applied, the 75% voting rule so that a single member was unable to block Association proposals.

their spokesman (S.J.A. 3a). See *The Kroger Co., supra*, 148 NLRB at 573; *N.L.R.B. v. Southwestern Contractors Ass'n et al.*, 379 F. 2d 360, 363-364 (C.A. 10).

B. The Unions accepted the multiemployer unit

The Board found, in agreement with the Trial Examiner, that both Unions accepted the new multiemployer bargaining unit by their participation in the negotiations (S.J.A. 5a-6a; J.A. 85-91). The record amply supports that finding. As shown, *supra*, pp. 5-8, the Association was formed only after Wyatt had explained to the Unions that it would be the means of multiemployer bargaining. Both Unions indicated their willingness to bargain on that basis, especially LSW, in view of the protection from decertification elections that a multiemployer unit would afford. The Unions unhesitatingly entered the 1963 negotiations with the Association, dealing with it as an entity and recognizing that Wyatt was making proposals which would be binding on all of its members (S.J.A. 5a, J.A. 6, 91; 617, 660).

In turn, the Unions sought a single commitment from the Association. In their reports to their members, they referred to the negotiations as being with the Association rather than with individual member companies (J.A. 87). The Unions characterized the bargaining impasse both reached with Wyatt as "with the Big Six Association," and sought support of the strikes they called on the ground that such action was necessary "to obtain an industry wide settlement" (*supra*, pp. 29-30). Even after filing charges alleging that the multiemployer lockout in response to the strike was unlawful,

both Nelson and Hartley indicated to Wyatt that they favored the Association as an instrument of bargaining, and wished it to succeed. Hartley even characterized the charges as nothing but a "tactic" to "give the boys something to think about during the strike"; it "shouldn't stand in the way of our getting together" (*supra*, p. 32).

Having filed charges, the Unions issued self-serving letters and statements disavowing the parties' creation of a multiemployer unit, and to the effect that they always dealt with the Association as no more than the common representative of individual employers. The Unions, however, did not demand separate negotiations, even after Wyatt made clear that he was only bargaining on an Association basis. In short, the Union spokesmen treated their statements as *pro forma* expressions for the record which should not interfere with the parties bargaining to a common agreement (J.A. 87; *supra*, p. 36). And in addition to executing an agreement reached with the Association the Unions sought and obtained agreement on the establishment of several joint association-union committees, to study and make recommendations with respect to the effects of automation, employment, displacement of employees, job classifications, and other relevant subjects in the industry (S.J.A. 4a; RX 222 p. 4).

The factors showing that the parties bargained on the basis of a single, comprehensive unit are not refuted by the Unions' counter arguments. Initially, the Unions repeatedly assert that LSW's required consent to a multiemployer unit was vitiated by an allegedly unresolved issue as to whether the unit would include three plants of St. Regis and U.S. Plywood which were located east of the Cascades (Un. Br. 59-60, 11-12). The evidence, however, indicates that LSW agreed to

the composition of the unit and accepted the exclusion of these three plants (S.J.A. 5a-6a; J.A. 90, 77, 42-46).

Thus, LSW stated at the first meeting, on May 9, that it would not agree to the exclusion of these plants. Wyatt made it equally clear that the Association had not been empowered to speak for any plants not included in the Association agreement. As he explained to Hartley and Johnston, if it were a make-or-break situation, the parties could not proceed on an Association basis. Faced with this alternative, LSW caucused. Upon their return, Johnston stated that LSW would be speaking for all of its locals but recognized that Wyatt would be "speaking for all, but three plants." Wyatt replied that he understood Johnston's position but wanted it understood that "this association cannot speak for the plants excluded." St. Regis' representative confirmed Wyatt's statement, though he expressed a willingness to meet separately with the Union on that company's excluded operations (S.J.A. 5a-6a, n. 10). LSW officials were wholly aware that the question of unit composition had been taken care of, for Hartley commented that "we have got rid of the technicalities," and Johnston proceeded to outline LSW's contract proposals (*supra*, p. 23).²³

²³ The Unions also assert that LSW's acceptance of the unit was conditioned upon an express guarantee of a single master contract and the inclusion of the three subjects excluded by the Association — union security, pensions and health and welfare (Un. Br. 59, 11). The Board found that neither of these demands was a condition precedent to LSW's acceptance of the multiemployer unit (J.A. 90). Rather, as to the master contract, Johnston advanced it simply as a bargaining proposal, and at one meeting offered to drop it as a demand if the Association would withdraw its demand for a variable workweek.

(continued)

The other main thread of the Unions' argument is that their acceptance of the multiemployer bargaining unit was vitiated by Wyatt's alleged "concealment" of the "highly material" fact that Association decisions were governed by the 75 percent voting rule (Un. Br. 62-68, 11). This assertion, likewise, does not withstand analysis. Neither IWA nor LSW asked Wyatt how the Association members determined which contract proposals would be made on their behalf. While Johnston made several inquiries about the structure of the Association during the first meeting on May 9, including the possible use of a lockout, he expressed no concern over how the employers intended to formulate their bargaining position (*supra*, pp. 20-21). If this had been a determinative factor in his decision to recognize the multiemployer unit, he need only have asked, since Wyatt directly and truthfully answered all of his other questions about the Association (J.A. 71-72).

In these circumstances, therefore, the Unions are forced to argue that the 75 percent rule is such an unreasonable and unusual procedure for reaching decisions in a multiemployer association that the Court should presume that its revelation "would have precluded the willingness of the unions to commence Association negotiations" (Un. Br. 62-63). The Unions do not demonstrate how the Association's internal decision-making procedure is so at odds with that typically used by employers, or unions, as to prevent the multiemployer

23 (continued)

(J.A. 50 n. 31, 51, 320, 18). As to the excluded subjects, there is no evidence that the LSW was either authorized by the locals, or in fact ever sought, to bargain on these subjects (J.A. 75-76; *supra*, pp. 6-7, 9-11, 20-29).

bargaining relationship from arising. Rather, it is asserted that the Board was required to accept the following line of apparent reasoning: by recognizing the multiemployer unit the Unions subjected themselves to the possibility of a defensive lockout whenever they resorted to a whipsaw strike; this sacrifice of a potent bargaining weapon, however, was acceptable since the Unions anticipated that the "intransigence" at the bargaining table of Weyerhaeuser, the largest employer, would be blunted by the ability of the other five companies to outvote Weyerhaeuser within the Association; since this anticipation was disappointed by the 75 percent rule, the Unions should not be held to have consented to the multiemployer unit.

The record does not show that the above considerations bottomed the Unions' acceptance of multiemployer bargaining. In any event, the Unions' argument rests on a factual claim properly rejected by the Board. As demonstrated above, the 75 percent rule did not permit Weyerhaeuser, or any other single member, to veto a settlement desired by the other members, and Weyerhaeuser was effectively outvoted on two occasions (*supra*, p. 49). Moreover, it could be reasoned that Weyerhaeuser relinquished some potential voting power by agreeing to the 75 percent rule. Had it, for example, insisted upon weighted voting in proportion to the number of employees each member-company employed, it might well have been able to veto any proposal (S.J.A. 4a; J.A. 290-291, RX 386). In other words, some sort of "minority" control may inhere in any voting procedures. The one chosen by the Association, however, does not negate the necessary group commitment, for under the procedure each employer still cannot pursue his individual bargaining position.

Correspondingly, parent unions may use varying internal procedures to reconcile the bargaining demands of their constituent locals when bargaining on their behalf. See, *Independent Stave Co., Inc. v. N.L.R.B.*, 352 F. 2d 553, 561 (C.A. 8), cert. denied, 384 U.S. 962; *Adams Division, Letourneau Westinghouse Co.*, 143 NLRB 827, 830-831; *Shell Oil Company*, 116 NLRB 203, 204-205. Aware of these difficulties inherent in any form of group bargaining, the Board does not require more than that the parties remain bound by group rather than individual action. This clearly was the case here.

In sum, the evidence clearly shows that the employers created, and the Unions, in the course of bargaining with the Association, accepted a multiemployer bargaining unit. Therefore, when faced by the Unions' avowed whipsaw strike tactics which were intended to split the ranks of the employers in the bargaining unit, the intervenors were entitled to lock out their employees in order to preserve the integrity of that unit. Such action is not violative of Section 8(a)(3) and (1) of the Act. *Buffalo Linen, supra*, 353 U.S. 87; *N.L.R.B. v. Brown*, 380 U.S. 278.

II.

THE BOARD PROPERLY FOUND THAT EVEN IN THE ABSENCE
OF A MULTIELPLOYER UNIT, EMPLOYERS USING A
SINGLE SPOKESMAN TO BARGAIN JOINTLY WITH A UNION
FOR COMMON CONTRACT TERMS MAY, IN ORDER TO
ADVANCE THE EMPLOYERS' COMMON BARGAINING
POSITION, SHUT DOWN THEIR PLANTS WHEN THE
BARGAINING REACHES AN IMPASSE AND THE UNION
STRIKES SOME OF THE EMPLOYERS TO ENFORCE
DEMANDS AGAINST ALL

- A. Since the lockout following the impasse served a legitimate business interest of each of the intervenors, and was not inherently prejudicial to statutorily protected rights, it was not violative of Section 8(a)(3) and (1) of the Act

In the light of this Court's remand opinion, the Board reaffirmed its original decision that, assuming *arguendo* a formal multiemployer unit either had not been formed or had not been accepted by the Unions, the lockouts here were, when judged by the principles announced in *American Ship*,²⁴ not violative of Section 8(a)(3) and (1) of the Act (S.J.A. 7a-12a). We respectfully submit that upon further consideration this Court should affirm the Board's decision in this respect as well.

First, it must be noted that the Unions have constructed an erroneous premise which underlines their entire

²⁴ *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300.

argument on this aspect of the case. The Unions repeatedly assert that this Court rejected the Board's *American Ship* rationale, and concluded that "the individual 'impasse' lockout ruling in *American Ship* is inapplicable where separate employers shut down in concert pursuant to a binding compact to invoke a concerted 'strike against all' lockout if any one is struck by the union" (Un. Br. 2, 3, 15, 17, 20, 23, 51). Nothing in this Court's decision holds that the principles of *American Ship* have no applicability to this case, and the Unions are unable to point to any language in the opinion to support such an assertion. To the contrary, the Court specifically refrained from reaching this issue (*infra*, n. 26). Rather, the Court was concerned with the seeming inconsistency of the Board's decision with its approach to the *Detroit News* case.²⁵ In the Court's view, the Board failed to explain why

25 *The Evening News Association*, 145 NLRB 996, enforcement denied, 346 F. 2d 527 (C.A. 6), and remanded, *sub nom.*, *Newspaper Drivers & Handlers Local Union No. 372, Teamsters v. Detroit Newspaper Publishers Association*, 382 U.S. 374. Following the Supreme Court's remand "for further consideration in light of *American Ship*," the Board reversed its original decision that the lockout was unlawful. The union, though negotiating separately with the two newspapers, made common demands on key bargaining issues. The union struck one paper, and suspended bargaining with, and threatened to strike, the other. The nonstruck paper then locked out its employees. The Board, in a supplemental decision issued on the same date as the supplemental decision in the case at bar, held that the shutdown, under the principles established in *American Ship*, was a permissible bargaining lockout. *Evening News Ass'n*, 166 NLRB No. 6, 65 LRRM 1425, petition for review pending, *sub nom.* *Newspaper Drivers & Handlers Local Union No. 372, Teamsters v. N.L.R.B.*, No. 18179 (C.A. 6).

"the joint aspects of the conduct of labor relations by the Detroit Newspapers failed to land them in the same bargaining unit for lockout purposes while the measures of cooperation here employed brought the lumber companies within the shelter of *American Ship*," 125 U.S. App. D.C. at 5, 365 F. 2d at 938.²⁶

Mindful of the Court's admonition to judge the legality of intervenors' conduct "by reference to the motivation upon which they *acted* rather than upon which they *might* have acted."²⁷ the Board concluded that the General Counsel had failed to sustain his burden of showing either that the intervenors' action was improperly motivated,²⁸ or that it was so inherently prejudicial to statutorily protected rights, as to be violative of the Act in light of the standards set forth in *American Ship* (S.J.A. 7a-12a). As the evidence shows, after

²⁶ The Court further stated: "The Board . . . appears to have believed in the case before us that there can be joint bargaining which falls short of a full-scale multi-employer unit but which still serves to bring a concerted multiple employer lockout within the protection of *American Ship*. The Board may or may not be right about this, but we think that this position is, at the least, ambiguous in relation to the representations subsequently made by the Board to the Supreme Court in *Detroit News* [382 U.S. 374]," 125 U.S. App. D.C. 2, 4, 365 F. 2d 934, 937.

²⁷ 125 App. D.C. at 2, 365 F. 2d at 935.

²⁸ The Unions did not assert in their briefs before the Board on remand, nor do they now claim, that the lockouts were motivated either by a desire to discourage union activity or to evade bargaining (S.J.A. 11a).

reaching an impasse in their negotiations with the Unions,²⁹ and after the Unions had struck two members of the Association, the intervenors locked out their employees "to protect the unity of the bargaining position taken jointly by all members of the Association, pursuant to the agreement establishing the Association" (S.J.A. 7a-8a). This was the reason announced by the employers at the time of the lockout (*supra*, p. 31 n. 15), and was the only type of lockout for which the Association agreement provided. For unless the strike involved an issue which was the subject of bargaining between the Unions and the Association, the agreement provided that "the other members of the association shall not be deemed affected nor be required to close or suspend any operations by means of such strike" (RX 206; *supra*, pp. 10-11 no. 5). Thus before the intervenors reached the decision to lock out, they first met and determined that the object of the strike was to force concessions from the employer on subjects upon which the members, through their Association spokesman, had taken a common bargaining position. Concluding that their individual (and common) bargaining position was threatened by the Unions' whipsaw strike, the intervenors shut down their plants pursuant to the Association agreement (*supra*, p. 30).

From the foregoing it is clear that, in the circumstances presented here, there can be no realistic distinction drawn between locking out "to protect the interest of our group against this selective strike," the stated purpose of the lockout,

²⁹ The Unions do not contest the uncontested findings of the Trial Examiner and Board that the Unions broke off negotiations because of an impasse over economic items (S.J.A. 8a-9a, J.A. 2-3, 39, 51, 53; *supra*, pp. 19, 28, 29).

and locking out "to affect the outcome of the particular negotiations in which [each of the intervenors] was engaged." *American Ship*, *supra*, 380 U.S. at 313. Employers who bargain as a group are not interested in preserving their solidarity simply for its own sake. Rather, they seek to preserve the advantages of collective power vis-a-vis the unions which such bargaining affords. Bargaining in a formal multiemployer unit permits, *inter alia*, "the employers to match increased union strength . . . and avoid . . . the competitive disadvantages resulting from nonuniform contractual terms." *Buffalo Linen*, *supra*, 353 U.S. at 94-96.³⁰ Group bargaining through a joint spokesman for uniform contract terms, however, may be undertaken without the parties establishing a formal multiemployer unit which would determine the scope of future representation elections. See *Bennett Stone Company*, 139 NLRB 1422, 1424-1425; *The Kroger Co.*, *supra*, 148 NLRB at 574; *Moscow Idaho Seed Co., Inc.*, 107 NLRB 107, 108; *Detroit Newspaper Publishers Association, et al. v. N.L.R.B.*, 372 F. 2d 569 (C.A. 6). When employers bargain on a joint basis, their common bargaining position is equally threatened by a union's whipsaw strike; it is equally this bargaining position

³⁰ As one commentator has observed, "the Court [in *Buffalo Linen*] went on to make clear that the preservation of the larger unit was not an end in itself but a means of improving the employers' ultimate bargain." Meltzer, "Lockouts: Licit and Illicit," New York University Sixteenth Annual Conference on Labor (1963), pp. 25-26.

which they are attempting to preserve by resorting to a lock-out.³¹

It is true, as the Unions assert (Br. 25-26, 27 n. 6), that the Board formerly limited the right to lock out to narrowly defined circumstances and regarded a bargaining lockout as "presumptively or *prima facie* unlawful."³² However, *American Ship*, as the Board recognized, "has changed the ground rules to some extent, so that the inquiry does not end by concluding that a lockout is not wholly defensive in nature." *Evening News Ass'n*, 166 NLRB No. 6, 65 LRRM 1425, 1426, 1427. Thus, it is immaterial that the employers' action here — agreeing to take a common position with the Unions in their

³¹ Similarly, the Unions attempted to secure better terms for their respective members by coordinating their bargaining policies and strike tactics, and thereby avoiding the possibility that the employers would play one union against the other (*supra*, pp. 25-26, 29, 32-38 and 33 n. 16). When the Unions struck only two members of the Association, it was not to threaten the integrity of the group form of bargaining, but rather was considered to be "the most effective method to obtain an industry wide settlement, in the shortest time with the least sacrifice by the members" (*supra*, p. 30).

³² It should be noted, however, that the "*Morand-Davis rationale*" upon which the Unions rely (Br. 26), was rejected by the reviewing courts. See *Davis Furniture Co.*, 100 NLRB 1016, enforcement denied, *sub nom.*, *Leonard v. N.L.R.B.*, 205 F. 2d 355 (C.A. 9); *Morand Bros. Beverage Co.*, 91 NLRB 409, reversed and remanded, 190 F. 2d 576, enforced on other grounds, 204 F. 2d 529, 532-533 (C.A. 7), cert. denied, 346 U.S. 909. To the extent that the Unions urge that a bargaining lockout is presumptively unlawful because it inherently discourages union membership, coerces employees in their right to bargain or interferes with the right to strike, such rationale has been rejected by the Supreme Court. *American Ship*, *supra*, 380 U.S. at 308-313.

negotiations and, to strengthen their position, locking out their employees – might have been found by the Board to be unlawful prior to *American Ship*, absent a multiemployer unit. As the Board observed in *Evening News Ass'n, supra*, 65 LRRM at 1426:

There is no question but that the Supreme Court's *American Ship* decision has obliterated, as a matter of law, the line previously drawn by the Board between offensive and defensive lockouts. For the Supreme Court squarely held in *American Ship* that an employer could lock out, after an impasse in bargaining had been reached, for the sole purpose of bringing economic pressure to bear on the union to accept the employer's legitimate bargaining position. We can no longer conclude, therefore, that a lockout is unlawful solely because it is not defensive in nature. [³³]

Accordingly, rather than simply determining whether the lockout here was defensive or offensive, the test to be applied is "whether the lockout 'is inherently so prejudicial to union interest and so devoid of significant economic justification' that no evidence of [discriminatory] intent is necessary." *Evening News Ass'n, supra*, 65 LRRM at 1426, quoting from

³³ See Meltzer, *supra*, n. 30: "[A]s to any particular defensive lockout, it would be a heroic task to determine whether its primary significance goes to preserving the unit rather than to exerting economic pressure. Indeed, those two purposes are so inextricably linked that trying to disentangle them involves an unprofitable word game."

American Ship, *supra*, 380 U.S. at 311. Accord: *N.L.R.B. v. Brown*, 380 U.S. 278, 286; *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34.

Applying these principles to the present case, the Board concluded that intervenors' actions did serve a significant employer interest, and were not shown to be inherently destructive of statutorily protected rights (S.J.A. 11a-12a, J.A. 4-5). In so concluding, the Board observed that in the context of joint bargaining where each company advances a common bargaining position through a single representative, agrees to be bound by any agreement reached on its behalf, and advises the union of this commitment, and where the union, through the joint representative, makes common demands on each, the employer has a legitimate interest of its own to protect when the union strikes some of the other employers in order to secure a more advantageous common settlement from all of the employers (S.J.A. 10a-11a and n. 19). In such a case, each employer, like the single employer in *American Ship* who locked out when bargaining reached an impasse, is entitled to lock out its employees in furtherance of that interest.³⁴

Nor was the lockout transformed into an illegitimate weapon merely because it also had the effect of supporting

³⁴ The Unions suggest that a "gross imbalance" results if employers engaged in joint bargaining are permitted to utilize a lockout in response to a whipsaw strike (Un. Br. 31). But as one commentator has suggested, where the union, through group bargaining and whipsaw strikes, is able to secure a group contract, it is the employer who is placed at a disadvantage if denied the right to lock out. See Note, 53 Virginia Law Review 1189, 1200, 1207 (1967).

the bargaining position of other members of the Association (S.J.A. 11a). Rather, by locking out, each of the intervenors sought to advance its own bargaining position by aiding the struck employers in their attempt to withstand the Unions' efforts to raise the cost of a common labor settlement. When each laid off its employees, it was concerned with the obvious effect concessions granted by the struck employers would have on its own ability to adhere to its bargaining position. The cessation of production relieved the competitive pressures of the whipsaw strike, strengthened the struck employers' ability to resist Union demands, and minimized the possibility that they would accede to demands which exceeded the common terms offered by the Association. In short, while an immediate effect of the lockout was to aid the struck employers, its purpose was to advance each employer's own cause. As the Unions had been told during negotiations, the lockout procedure was formalized before negotiations had even begun (*supra*, pp. 19-20, 21, 28; J.A. 39). But this was simply recognition of the fact that in the event bargaining reached an impasse, a union whipsaw strike and the concomitant reduction in employer bargaining power were inevitable (see *supra*, pp. 59, 61 nn. 29, 31). In these circumstances, we submit, the Board could properly conclude that each of the intervenors was entitled to lock out its employees even though the benefits thereof also accrued to other members of the employer group.³⁵

³⁵ The Unions' hyperbolic descriptions of the alleged breadth of the Board's holding herein is scarcely warranted. The Board validated the lockout on the basis of the facts established by this record, and expressly held it "both unnecessary and undesirable to attempt to establish herein the precise limits of 'joint bargaining' as a generally controlling legal concept" (S.J.A. 10a, n. 19). This

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B. Intervenors' lockout was neither inconsistent with
the antitrust prohibitions set forth in the
Pennington case, nor contrary to the secondary
boycott provisions of the Act

The Unions, relying upon *United Mine Workers v. Pennington*, 381 U.S. 657, again press the argument that the agreement between the employers to bargain jointly through the Association "violates the antitrust statutes even in the absence of any boycott to enforce the compact" (Un. Br. 43). In addition, they assert that the intervenors' lockouts are the "exact counterpart" of secondary strikes which are prohibited by Section 8(b)(4) of the Act, and urge that the prohibitions of that section should be "assimilated" into Section 8(a)(1) to prohibit a "secondary lockout" (Un. Br. 33). Both of these contentions, which this Court considered *sub silentio* when previously made, are farfetched.³⁵

35 (continued)

is consistent with this Court's admonition that "group activity can and does range over a wide spectrum of habits, practices, and understandings, explicit and implicit, [making] generalization more hazardous than usual." *Retail Clerks Union No. 1550 v. N.L.R.B.*, *supra*, 117 U.S. App. D.C. at 342, 330 F. 2d at 216.

³⁶ In addition to *American Ship*, the intervening holdings in *Pennington* and *N.L.R.B. v. Brown*, *supra*, were also urged before the Supreme Court as grounds for Board reconsideration of *Detroit News*. The Supreme Court, however, remanded solely in the light of *American Ship* (*supra*, p. 57 n. 25). In the view of this Court in its original decision herein, the Supreme Court effectively indicated that the other holdings had no applicability to the issues presented. Likewise, we submit, the judicial silence accorded reliance on *Pennington* in

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In *Pennington*, the Supreme Court held that it would be violative of the antitrust laws for a union and a group of employers to conspire to drive smaller companies from the coal industry through the guise of a collective bargaining agreement, the terms of which the union promised to impose upon the non-unit operators regardless of their ability to pay. 381 U.S. at 660, 664. Since one group of employers could not lawfully conspire to eliminate competitors, "the union is liable with the employers if it becomes a party to the conspiracy." 381 U.S. at 665-666. Thus, the Court rejected the union's contention that it was immune from the strictures of the Sherman Act simply because the device utilized to effectuate the anti-competitive scheme was a wage agreement. Construing the antitrust laws in the light of national labor policy, the Court concluded that a union should fulfill its representative obligations to its other members by responding "to each bargaining situation as the individual circumstances might warrant" rather than being "strait-jacketed by some prior agreement with the favored employers." *Id.* at 666, 668.

The proscriptions enumerated in *Pennington* are totally inapposite here. There was no attempt in this case to utilize the terms of a labor agreement to secure ends prohibited by

36 (continued)

the present context "confirms . . . that that case has little if anything, to do with the problem" (125 U.S. App. D.C. at 4 n. 2, 365 F. 2d at 937 N. 2).

the Sherman Act.³⁷ The Association agreement, and attendant bargaining and lockout, were not intended to lessen competition in the product market, or to be used "as the means or instrument for suppressing competition." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 501. Here, each employer's actions were motivated by an interest in securing a less costly wage settlement. *Pennington, supra*, 381 U.S. at 667;

³⁷ The Unions, quoting out of context from Wyatt's testimony explaining the formation of the Association, find a "confessed purpose" of a scheme which "presents a classical antitrust violation" (Un. Br. 44-45, 30 n. 10). The complete testimony does not even begin to support this characterization. Wyatt, admittedly concerned with increasing labor costs which were not sufficiently matched by product prices, saw the need for improving productivity. He felt that long range solutions were necessary, which would entail automation and better utilization of labor by eliminating the weekend overtime penalties. Because of the broad impact upon the companies of such solutions, it would be necessary for more than a single employer to attempt to bring about these desirable changes. Group bargaining, with all participants bound by the results, seemed to be required since both individual unions and employers were apparently unwilling to come to grips with these problems if others were not (J.A. 106-107, 126-127, 130-131, 177, 356-357). As a result of this method of bargaining, for example, joint association-union committees were created affecting automation, job classifications and travel time (*supra*, p. 37). In short, neither Wyatt's testimony nor the fruits of the bargaining with the Association suggest that the members had a predatory intent to eliminate nonmembers from the industry. Cf. *Lewis v. Pennington*, 257 F. Supp. 815, 828-829 (E.D. Tenn.); *Ramsey v. United Mine Workers*, 265 F. Supp. 388, 398-399 (E.D. Tenn.); Meltzer, *Labor Unions, Collective Bargaining, and the Antitrust Laws*, U. of Chi. L. Rev. 659, 721 (1965); Cox, *Labor and the Antitrust Laws: Pennington and Jewel Tea*, 46 B.U.L. Rev. 317, 321-322 (1966).

Kennedy v. Long Island Rail Road Co., 319 F. 2d 366, 372-373 (C.A. 2), cert. denied, 375 U.S. 830.³⁸

Nor, unlike *Pennington*, were the employers here attempting to fix the cost of labor for other bargaining units or the entire industry. See 381 U.S. at 666. Rather, each employer, by resorting to a lockout, was attempting to lessen the Unions' chance of obtaining an agreement on terms better than those jointly offered by the Association members. Each employer was endeavoring to minimize the cost of the labor settlement to itself by reducing the pressure on the struck employers to capitulate to the higher demands which the Union hoped to secure by striking the members *seriatim*. Cf. *Clune v. Publishers' Association of New York City*, 214 F. Supp. 520, 524 (S.D. N.Y.), affirmed, 314 F. 2d 343 (C.A. 2). Compare, *Kennedy v. Long Island Rail Road Co.*, *supra*.

³⁸ The citation with approval in *Pennington* (381 U.S. at 664) of *Apex Hosiery* highlights the significance of this distinction. In the latter case, the Court said: "[A]n elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act" (310 U.S. at 503-504). In *Kennedy*, for example, the union contended that the railroad industry strike insurance plan, which provided for financial assistance to strengthen the bargaining position of struck roads in face of whipsaw strikes, constituted a *per se* violation of the Sherman and Interstate Commerce Acts. Said the Court: "These assertions must also fail, for the fundamental reason that the named statutes were designed principally to outlaw restraints upon commercial competition in the marketing and pricing of goods and services and were not intended as instruments for the regulation of labor-management relations." 319 F. 2d at 372-373.

Moreover, the Supreme Court in *Pennington* expressly noted that collective bargaining agreements between unions and employers in multiemployer bargaining units do not violate these statutes, despite any anti-competitive effect which might flow from obtaining uniform contract terms. 381 U.S. at 664, citing *Apex Hosiery, supra*, 310 U.S. at 503-504, and *Adams Dairy v. St. Louis Dairy Co.*, 260 F. 2d 46 (C.A. 8). See also, *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 689-690, and also at 697, 712-713 (opinion of Mr. Justice Goldberg). Thus, the Unions' argument must be reduced to the contention that when unions consent to the formal alliance of employers in a multiemployer bargaining unit, the employers may eliminate competition among themselves with respect to employment conditions, free from the proscriptions of the Sherman Act;³⁹ but, where union sanction to the merging of individual units is absent, and the parties merely engage in joint bargaining, a case of unlawful employer combination is established (see Un. Br. 43). As shown, however, in either case the parties are seeking uniform terms of employment, an objective which was approved in *Pennington*; the distinction premised solely on

³⁹ In their brief to this Court in the original proceedings, No. 19,842, the Unions stated (p. 53): "Concededly, Sherman Act protections from competitors' wage-fixing agreements may be nullified where a multi-employer bargaining unit is effectively established and accepted for collective bargaining purposes. Cf. *Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676. That is because of a competing and overriding social value attached to bargaining on a multi-employer basis where employers and unions consciously desire and agree to such a format."

the basis of bargaining format finds no support in *Pennington*, and there is no rational basis for drawing it.

Furthermore, in no sense did the form of negotiations here place "restraints upon the freedom of [the Unions] to act according to their own choice and discretion" (381 U.S. at 668). The Association bargaining format was eagerly sought and encouraged by the Unions, one through which they willingly dealt in making their demands, and from which they successfully secured a common labor contract. In sum, whether the negotiations here are viewed as joint or multiemployer bargaining, *Pennington* affords no support for the Unions' assertion that they contravene either the antitrust laws or national labor policy. Compare, *Chicago Typographical Union No. 16, etc.*, 86 NLRB 1041, 1065-1066, enforced, 193 F. 2d 782 (C.A. 7), cert. denied as to this aspect, 344 U.S. 812. See also, *Local 1976 Carpenters v. N.L.R.B.*, 357 U.S. 93, 108-111.

Equally lacking substance is the Unions' related argument that the intervenors should be prohibited from engaging in a lockout "supportive" of the struck employers because unions are barred by Section 8(b)(4) from using secondary strikes against neutral employers (Un. Br. 31-35). The simple answer to this contention is that the proscription against union use of secondary boycotts flows not from Board-developed policy as to the appropriate limitations on the use of economic power,⁴⁰ but solely from Congressionally imposed limitations which have no counterpart in Section 8(a) of the Act. See *Local 1976, Carpenters v. N.L.R.B.*, *supra*, 357 U.S. at 100. In any

⁴⁰ See generally, *N.L.R.B. v. Brown*, 380 U.S. 278, 283, 292.

event, to cast the intervenors and their employees in the role of "neutrals" to the dispute between the Unions and struck employers is to distort completely the factual context of the lockout here. Each of the locking-out employers had been bargaining with the International representatives of their employees to the point of impasse, and therefore each was entitled, under *American Ship*, to lock out, even in the absence of a strike (S.J.A. 11a). As we have shown, that the lockout supported the bargaining position of the struck employers does not render it any less an instrument for legitimately supporting the bargaining position of each of the intervenors. The settlement reached between the struck employers and Unions would immediately determine the cost of each of the intervenor's agreements with the Unions, since the purpose of the selective strike policy was to obtain common contract terms from all members of the Association (S.J.A. 10a, n. 17; RX 378). See, *Evening News Association*, 166 NLRB No. 6, 65 LRRM 1425, 1427. And as the Unions made clear, it was also a matter of time before the strike would be extended to other of the members (J.A. 53, 58, n. 38; RX 378, 382 p. 3).

In the above circumstances, it cannot seriously be contended that the intervenors, by locking out, were injecting themselves into "controversies not their own" (Un. Br. 33), or that the dispute between the struck employers and the Unions was solely of "local" concern. Cf. *Publishers' Association of New York City*, 139 NLRB 1092, 1098, enforced *sub nom.*, *New York Mailers' Union No. 6 v. N.L.R.B.*, 327 F. 2d 292, 299 (C.A. 2); and see, *Acme Markets, Inc.*, 156 NLRB 1452, 1457; *The News Union of Baltimore v. N.L.R.B.*, (*Hearst Corp.*), Nos. 20,743 and 20,787 (C.A. D.C.), decided

February 9, 1968 (67 LRRM 2487). Moreover, the intervenors' employees were scarcely "neutrals" in the labor dispute. They and their locals had delegated bargaining authority to the Unions, who determined for strategic reasons that intervenors' employees could best serve the common cause by continuing to work. This operated not only to put pressure on the struck employers whose business would be diverted to the nonstruck employers, but also enabled these employees to subsidize the other locals' strike through special assessments. As IWA explained to its members at the commencement of the strike, "The contributor today, may be a recipient tomorrow" (J.A. 53; RX 378). Thus, the intervenors' employees were closely allied with the striking locals in a mutual effort to increase the ultimate cost of settlement to all of the Association's members. Compare, *N.L.R.B. v. Enterprise Ass'n, etc., Local 638*, 285 F. 2d 642, 644-645 (C.A. 2).

Accordingly, the Unions' analogy to the prohibitions on secondary boycotts is entirely inapposite since each of the intervenors, in locking out its employees, "was not extending its activity to a front remote from the immediate dispute but to one intimately and indeed inextricably united to it" *National Woodwork Manufacturers Association v. N.L.R.B.*, 386 U.S. 612, 621.⁴¹

⁴¹ *David Friedland Painting Co., Inc.*, 158 NLRB 571, enforced, 377 F. 2d 983 (C.A. 3), is not to the contrary. In *Friedland*, the Employer was obligated under his bargaining agreement to hire some members of sister locals when performing work in their jurisdictions, at their contract rates. When a sister local went on strike during negotiations with other employers, the Employer locked out those members of his work force who were members of the sister local. In the Board's view, and in sharp contrast to the direct interest of the

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CONCLUSION

For the reasons stated above, we respectfully submit that the petition to review the Board's order should be denied.

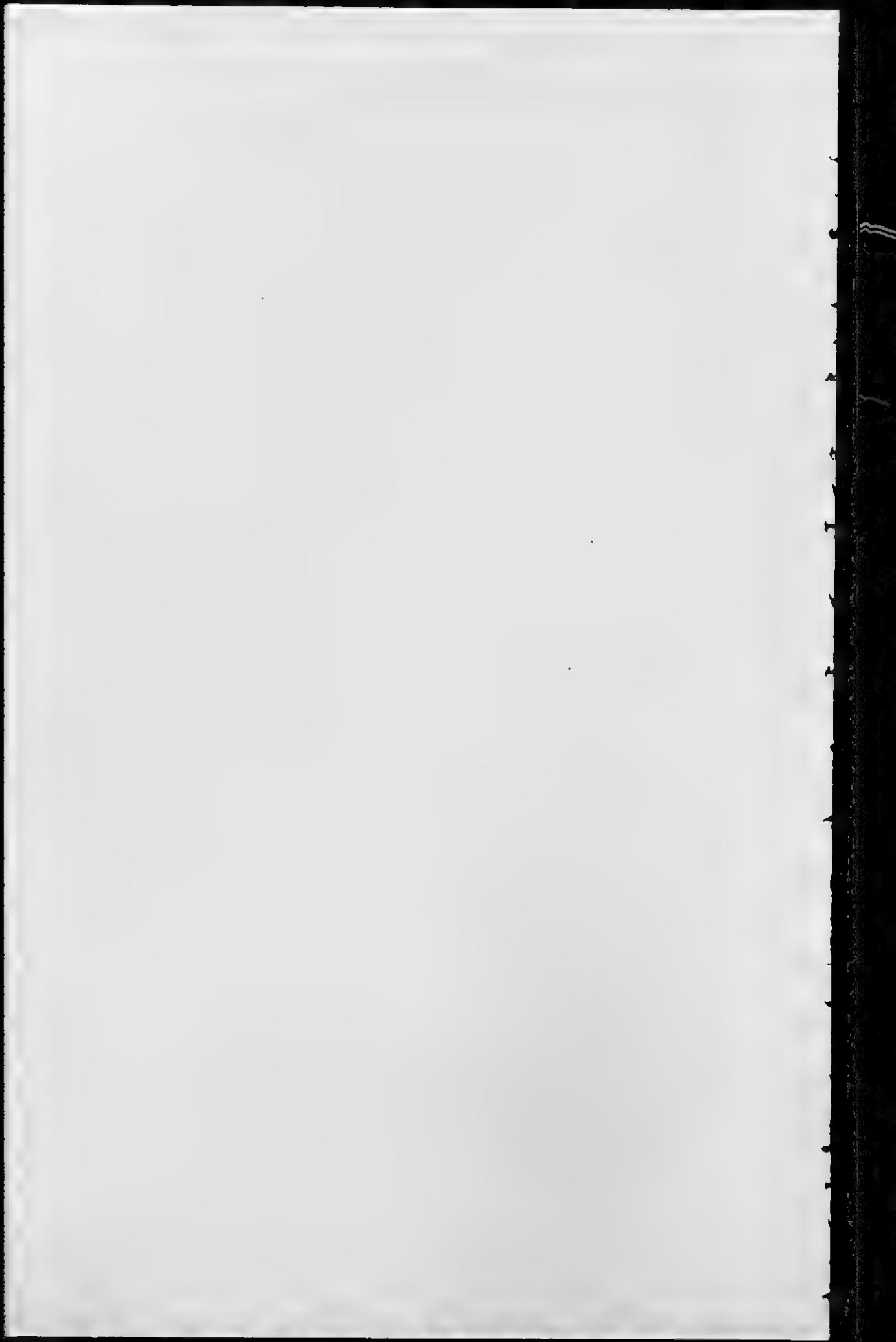
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February 1968.

41 (continued)

intervenors in the case at bar, the Employer's interest in the contract settlement between a sister local and other employers was insufficient justification for the lockout. As the Board stated: "To allow this collateral or indirect interest in a labor dispute to be deemed a legitimate business interest, sufficient to serve as justification for a lockout of respondent's own employees is to arrive at a far-reaching result never intended by the Supreme Court in *American Ship Building*," 158 NLRB at 578. The Third Circuit, in enforcing the Board's order, noted that since the striking union was not making any demands against the Employer, he "had no legitimate bargaining position to protect." 377 F. 2d at 988. The Employer's "general interest in keeping the cost of labor from increasing" in other localities was deemed insufficient to justify the interference with its own employees' Section 7 rights brought by the supportive lockout. (*Ibid.*)



APPENDIX

[Tr. 1343] * * * *

TRIAL EXAMINER: St. Regis was concerned only with one of these two charging unions?

THE WITNESS: No, they have employees in both unions.

MR. TOULOUSE: Rayonier.

TRIAL EXAMINER: Rayonier, is that it?

THE WITNESS: Rayonier had no contract with the Lumber and Sawmill Workers.

TRIAL EXAMINER: That was why you were mentioning then that there was a certain percentage of five who were to determine the offers, and so on?

THE WITNESS: Well, it so happens that the 75 per cent rule as it appears in the Association agreement was such that there, whether you were talking about five or six, no single company could succeed in preventing an action.

TRIAL EXAMINER: That is if you throw out fractions?

[Tr. 1344] THE WITNESS: Well, three and three—

TRIAL EXAMINER (interrupting): Or went to the next largest or nearest whole number.

THE WITNESS: Yes. The point is that three and three quarter, or 75 per cent of five is three and three quarter, which means it would take one and a quarter to defeat—well, it takes more than one is what I am saying.

TRIAL EXAMINER: So, your interpretation, then, is that when it was a quarter that required a full extra vote?

THE WITNESS: Oh, yea.

TRIAL EXAMINER: In order to defeat it?

THE WITNESS: Yes.

TRIAL EXAMINER: And the same way if it were five and a half or three quarters, or whatever it would be in the case of the six, right.

THE WITNESS: What we said is that it requires a 75 per cent favorable vote. Now, in the case of the wording of the agreement is that today, it requires a 75 per cent favorable vote and if two voted against it in either of the situations, the five or the six, there was not a 75 per cent favorable vote. If four in the case of five voted in favor of it, you had more than a 75 per cent vote, and if five out of six voted in favor of it, you had a 75 per cent favorable vote.

You see, as I testified on direct, one of the reasons for this, we never knew when we might be able to expand the [Tz 1345] Association for one thing.

MR. TOULOUSE: Mr. Examiner, in that connection would you inquire whether it took two to initiate an offer, two could present the initial offer, or two could present or accept the rejection of an offer, if I understand you correctly.

TRIAL EXAMINER: I am not sure I understand you correctly.

MR. TOULOUSE: In other words, any two could prevent the initiation of any type of an offer of a package to either one of these unions.

THE WITNESS: Yes, I would think in the—yes, I would think any two.

MR. TOULOUSE: Of any two were in a position to reject any proposal of these unions.

THE WITNESS: Assuming that the motion in the Association was to accept ?

MR. TOULOUSE: I am saying assuming.

THE WITNESS: Assuming that, two votes could result in no acceptance of it.

* * * * *

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BRIEF OF INTERVENORS

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,317

WESTERN STATES REGIONAL COUNCIL No. 3, INTERNATIONAL
WOODWORKERS OF AMERICA, AFL-CIO,
and

WESTERN COUNCIL OF LUMBER AND SAWMILL WORKERS,
AFL-CIO, Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent
and

WEYERHAEUSER COMPANY, CROWN ZELLERBACH CORPORATION,
RAYONIER INCORPORATED, INTERNATIONAL PAPER COMPANY
AND ASSOCIATION, Intervenors.

On Petition to Review an Order of the National Labor
Relations Board

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United States Court of Appeals

for the District of Columbia Circuit
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STATEMENT OF QUESTIONS PRESENTED

As set forth in the Prehearing Conference Stipulation, the following are the questions presented in this case:

- "1. The parties state that the first issue presented is: Whether the Board properly found that the unions and employers created a multiemployer unit and that intervenors' shutdown of their plants in response to the unions' strike of two employers in the multiemployer unit was lawful action under the *Buffalo Linen* case.
2. The parties have agreed to separately state the second issue presented as follows:
 - a. Petitioners state that the second issue presented is: Whether the Board properly ruled that in the absence of a multiemployer bargaining unit, the principle of *American Ship Building* validates a concerted lockout in response to a strike against individual employers bargaining in an association format.
 - b. The Board and intervenors state that the second issue presented is: Whether the Board properly found that even in the absence of a multiemployer unit, employers using a single spokesman to bargain jointly with a union for common contract terms may, in order to advance the employers' common bargaining position, and absent any evidence of antiunion motivation, shut down their plants when the bargaining reaches an impasse and the union strikes some of the employers to enforce demands against all."

This case under No. 19,842 was before a panel of this Court and was remanded to the Board for further proceedings, and is now before the Court on a record which includes the original record on appeal.

(i)

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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,317

WESTERN STATES REGIONAL COUNCIL No. 3, INTERNATIONAL
WOODWORKERS OF AMERICA, AFL-CIO,
and

WESTERN COUNCIL OF LUMBER AND SAWMILL WORKERS,
AFL-CIO, Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent
and

WEYERHAEUSER COMPANY, CROWN ZELLERBACH CORPORATION,
RAYONIER INCORPORATED, INTERNATIONAL PAPER COMPANY
AND ASSOCIATION, Intervenors.

On Petition to Review an Order of the National Labor
Relations Board

BRIEF OF INTERVENORS

COUNTER-STATEMENT OF THE CASE

The principal events with which this case is concerned
are as follows:

In 1963, a group of six employers in the Pacific Northwest
lumber and plywood industry formed an association

for the purpose of negotiating with two unions, i.e., Western State Regional Council No. 3, International Woodworkers of America, AFL-CIO, (hereafter "IWA") and Western Regional Council of Lumber and Sawmill Workers, AFL-CIO (hereafter "LSW"). The unions were advised that Association bargaining would be on a joint basis and that all members would be bound to a common settlement; both unions accepted bargaining on this basis.

Negotiations proceeded with each union, the employers acting as a group through their Association. Each union made demands on the Association for substantial wage increases and other contract benefits. When the parties were unable to reach agreement on certain economic issues, the unions declared an impasse and in a coordinated move instituted whipsaw strike action on June 5, 1963 at plants of two of the six members of the Association, i.e., St. Regis Paper Company and United States Plywood Company, in order to secure an Association settlement on their terms. Upon ascertaining the purpose of the IWA and LSW strike action, the other four members of the Association on June 7, 1963 shut down their plants. These four, which together with the Association are intervenors herein, were Weyerhaeuser Company, Rayonier Incorporated, International Paper Company and Crown Zellerbach Corporation (hereafter sometimes called "respondent employers"). After further bargaining, on August 13, 1963, the Association and the two Unions entered into a single settlement agreement binding on all members of the Association.

Upon charges filed by IWA and LSW during the strike and lockout, a complaint was issued alleging that the lockout by respondent employers violated sections 8(a)(1) and (3) of the National Labor Relations Act, as amended. The theory of the complaint was that a bargaining lockout was presumptively unlawful under the Act. After a lengthy hearing, the Trial Examiner concluded that the case, as

found, was governed by *Buffalo Linen*¹ and recommended that the complaint be dismissed. The Labor Board affirmed material factual findings made by the Trial Examiner, but concluded that the case was controlled by *American Ship*² and *Brown*³ and ordered dismissal of the complaint. The Unions petitioned this Court for review of the Board decision and in accordance with their request this Court remanded the case for further consideration by the Board.

In its decision on the first review in which it ordered remand this Court said:

"The relief [petitioning unions] seek from us is a remand to the Board in order that it may address itself to issues which were litigated before, and resolved by, the Examiner (with reference to *Buffalo Linen*) ; and which, so petitioners assert, were improperly ignored by the Board."⁴

Accordingly, in its Supplemental Decision and Order, the Board first addressed itself to the issues framed with reference to *Buffalo Linen* as litigated and resolved by the Examiner, and then dealt with further questions suggested by the Court relating to the application of *American Ship* to employer joint bargaining assuming *arguendo* that a formal multiemployer "unit" was not established. The Board affirmed the Trial Examiner's *Buffalo Linen* finding, and further found, that, even if it were assumed that no multiemployer unit had been established, the lockout was lawful under *American Ship* and *Brown*.

¹ *Labor Board v. Truck Drivers Union (Buffalo Linen)* (1967), 353 U.S. 87.

² *American Ship Building Co. v. Labor Board* (1965), 380 U.S. 300.

³ *Labor Board v. Brown* (1965), 380 U.S. 278.

⁴ *Western States Reg. Comm. No. 5, Int. Woodworkers v. NLRB* (D.C. Cir. 1966), 125 U.S. App. D.C. 1, 365 F. 2d 934-935.

The Board recites in its Supplemental Decision and Order the salient facts established and the Trial Examiner's Decision reviews and analyzes the evidence in detail. The General Counsel on behalf of the National Labor Relations Board is including in his brief a comprehensive statement of the facts in the record. Therefore, other than the foregoing recital of the principal events, we shall not summarize the facts here. In our argument we will refer to the specific Board and Trial Examiner findings relevant to the points in issue and the record evidence on which these findings are based. In this brief, Intervenors will argue the two issues in the order in which they were stipulated in the prehearing conference stipulation.*

SUMMARY OF ARGUMENT

While we present the argument in terms of the separate applicability of *Buffalo Linen* and *American Ship*, we do not believe that these two landmark decisions fashion two entirely different rules for adjudging the lawfulness of an employer lockout. Rather, it is our view that *Buffalo Linen* and *American Ship*, viewed in meaningful context, apply to somewhat differing factual situations a single, uniform and controlling decisional principle under which employer lockouts are to be tested.

Buffalo Linen involved a defensive multiemployer lockout in response to a whipsaw strike aimed at the disintegration of multiemployer unity; and *American Ship* postulated a single employer lockout used offensively to advance a legitimate bargaining position. In each circumstance, the lockout was judicially sanctioned. These decisions lay to rest the contention that an employer lockout is in itself inimical to employee rights and so prejudicial to employee interests in collective bargaining as to carry its own stamp of unlawfulness. The principle to be distilled from these decisions is that, absent specific evidence of discriminatory motivation or antunion animus,

* See Statement of Questions Presented, *supra*, p. (1).

the employer lockout, whether used defensively to protect multiemployer unity or offensively to advance a bargaining position, is within the range of permissive economic weapons available to employers singly or as a group to advance their legitimate business interests in a bargaining dispute.

The lockout here clearly meets this test, and is lawful whether viewed as a defensive lockout to protect the multiemployer basis of bargaining or as an economic weapon to advance the individual bargaining interests of the employers whose bargaining interests were directly and intimately involved in the joint, fully bound association bargaining.

There is no allegation or evidence of discriminatory motivation or hostile intent. The lockout was without question invoked for the purpose of protecting the multiemployer bargaining group from disintegration in the face of the whipsaw strike, and to protect or advance the bargaining interests of each member of the multiemployer group. Thus, whether defined as multiemployer "unit" bargaining or as joint bargaining, the lockout was designed to advance the legitimate business interests of the employer members of the group directly engaged in the bargaining and was lawful under the principles enunciated in *Buffalo Linen* and *American Ship*.

We discuss the application of *Buffalo Linen* in Part I of our brief. We show that the Board's findings have compelling evidentiary support. The evidence shows that the employers set out to establish a fully bound association and a multiemployer unit, that they informed the Unions of that purpose, and sought and obtained their consent to bargain on that basis. The Unions' assent to this format of bargaining is consistently evidenced in both words and deeds. The parties did in fact bargain from start to finish on a multiemployer basis on the common economic issues which they mutually committed to the multiemployer bargaining, and the eventual agreement reached was an asso-

ciation agreement. When an impasse was reached at one stage in the multiemployer bargaining, the Unions mounted a concerted whipsaw strike, openly announced as a strategic move to force settlement with the entire employer group. The employers responded to this union stratagem with a lockout which, as the circumstances clearly disclose, was a defensive move to protect their interests in the multiemployer bargaining against the whipsaw strike.

Petitioners' basic contention is that the Unions did not agree to the multiemployer unit bargaining. But the Trial Examiner and the Board have considered and rejected this contention, finding on the basis of a full review of the facts that both Unions voluntarily accepted the multiemployer unit and agreed to, and did, bargain on that basis. The Unions' argument that they were not made aware of the employers' intent to establish bargaining as a multiemployer unit and did not accept bargaining on that basis is refuted by the record facts.

In Part II of our argument, we deal with the application of *American Ship*. In this part of the argument, we show that the holding of *American Ship* clearly governs if it is assumed or found that the employers were engaged merely in joint bargaining through their association as bargaining agent for each of them. In this context, the situation is disclosed as one in which each and all of the employers had bargained jointly with the unions to an impasse over economic issues. Each and all had a direct and primary interest in the bargaining dispute. The direct and primary interests of each and all of them were bound up in the bargaining, and the whipsaw strike was a direct attack on the individual bargaining posture of each employer. As the Board found, the subsequent lockout by the nonstruck employers clearly lacked discriminatory motivation and the lockout by each respondent employer was patently designed to serve the "significant employer interest" of that employer.

Petitioners have shown nothing to discredit these controlling facts and findings. The bargaining interests of each of the employers negotiating through the Association were just as immediate, just as direct, and just as primary as if each of them had bargained separately and alone. The use of the lockout in that situation is fully sanctioned by the doctrine of *American Ship*.

Petitioners' attempts to distinguish *American Ship* fall wide of the mark. Petitioners' basic argument is that the four locking out employers were "neutrals" with no primary interest in the dispute. All petitioners' separate contentions are hinged on this single premise which is demonstrably false. After first branding the locking out employers as "neutrals", petitioners postulate secondary boycott and antitrust analogies which have no basis in law or fact. All of these separate contentions lose relevance in the clear light of the evidentiary facts which disclose the primary interest which each employer had in the bargaining which led to the strike and lockout. Essentially, the petitioners establish a series of straw men which are demolished by the showing that each of the employers had a direct and immediate primary interest to protect.

Finally, in Part III, we return to the essence of *Buffalo Linen* and *American Ship*. Here, we show that there is no essential distinction between a lockout to protect a "unit" and a lockout to advance bargaining interests and objectives. These two separately stated objectives are inextricably intermingled and intertwined. Whether the lockout here is defined as a lockout to advance the bargaining interests of each member of the group or to protect the integrity of the multiemployer unit is largely a matter of the choice of words to express the same meaning. However defined, the essential purpose emerges as one of protecting a legitimate bargaining interest against a strategic strike. A lockout for such purpose, where bargaining interests are directly involved, is lawful under *Buffalo Linen* and *American Ship*.

ARGUMENT**L**

**THE BOARD PROPERLY FOUND THE LOCKOUT IN THIS CASE
LAWFUL UNDER BUFFALO LINEN BECAUSE A MULTIEL-
PLOYER UNIT HAD BEEN ESTABLISHED AND WAS AC-
CEPTED BY THE UNIONS**

The Board said in its original decision in this proceeding "The Trial Examiner found, for the reasons set forth in his Decision, that the six Companies comprising the Association had effectively formed a multiemployer bargaining unit, which unit was accepted by the Union Charging Parties in the course of bargaining" (J.A. 2). But four of the five ⁶ Board members found "it unnecessary to pass on the Trial Examiner's factual conclusions that the Association existed, functioned, and was accepted by the Unions as a formal multiemployer bargaining unit." (J.A. 2)

Upon reconsideration after remand by this Court, the Board, all five members participating, said:

"The Trial Examiner found, and we agree, that the six Employers comprising the Association had effectively established a multiemployer bargaining unit within the meaning of prior Board precedents, and that both Unions accepted that unit in the course of bargaining" (S.A. 2a-3a).

Petitioners attack this finding of the Board and the Trial Examiner in Part II of their brief. In their attack they disregard all evidence in the record contrary to their thesis and ignore the statutory rule that "findings of the Board with respect to questions of fact if supported by sub-

⁶ Member Brown adopted the findings and conclusions of the Trial Examiner (J.A. 5).

stantial evidence on the record considered as a whole shall be conclusive."?

A. The Employers Were Fully Committed To Be Bound By Group Bargaining Through the Association

Petitioners' first contention is that there was a lack of "Individual Employer Surrender of Bargaining Authority" and point out that a commitment by the several employers to be "bound" is a primary ingredient to multi-employer unit bargaining (Pet. Br. 52-53).

The record shows the essential elements of multiemployer unit bargaining were clearly set forth and understood by all parties before the joint multiemployer bargaining on substantive issues commenced. In the preliminary stages, the Unions were consulted about "the formation of a *fully bound* multiemployer unit" (J.A. 130).⁷ Before bargaining, the companies signed an agreement stating "Subject matters which *the Companies agree to submit to association bargaining* will be all matters pertaining to the wages, hours and other conditions of employment . . ." (excepting certain limited matters upon union agreement) (RX-206, par. (3)).⁸ IWA Council President Nelson testified, "that Mr. Wyatt informed [IWA] in the opening of negotiations on April 24, 1963 that the Big Six [i.e. Association] negotiations when concluded *would bind* the six companies involved" (J.A. 491-492), or in other words, "that all members *would be bound* as a result of negotiations between the two committees" (J.A. 511). Likewise,

⁷ National Labor Relations Act, sec. 10(e)(f), as amended, 29 U.S.C.A. 160(e)(f); *United Steelworkers of America v. NLRB* (D.C. Cir. 1967), — U.S. App. D.C. —, 376 F. 2d 770, 772; *O.R. Chemical and Atomic Works, Int'l. U., Local 4-243 v. NLRB* (D.C. Cir. 1966), 124 U.S. App. D.C. 113, 362 F. 2d 943, 944.

⁸ Throughout this brief emphasis has been supplied unless otherwise indicated.

⁹ The Association's organic agreement (cited as RX-206) is set forth in full in Appendix A to this brief.

it is undisputed that Wyatt told LSW in their first negotiating session on May 9 that "the association was agreeing to bind all of its member companies to any settlement reached" (J.A. 582, 617) and it was on this basis that collective bargaining proceeded.

The Board found:

"It is clear from the record herein that the six Employers who formed the Association possessed the requisite intention to be governed by group action. Thus, all of the Employers recognized from the outset that the Association was to function as a fully bound group" (J.A. 3a).

Likewise, the Trial Examiner found the requisite "solidarity expressed in the Association's agreement of an intention of the members of the Association to bargain jointly and be bound by the result of their joint bargaining" (J.A. 76; see EX-206).

Petitioners cannot and do not attempt to attack these finding on the basis of a consideration of the record. Instead, they make a number of assertions regarding evidentiary detail, each of which assertions is refuted by the record.

(1) Petitioners claim the Association was "formed in April of 1963 after bargaining between the companies and the unions had actually commenced by the making of individual-employer 'openings'" (Pet. Br. 53). The employers opened their separate contracts for bargaining in accordance with past practices (J.A. 20). But there was no bargaining on an individual or other basis until the Unions met with the Association negotiating committee. The Association agreement was signed by the companies between April 15 and April 22, 1963 (J.A. 22). The first collective bargaining meeting with IWA was on April 24, 1963 (J.A. 27). The first collective bargaining meeting with LSW was on May 9, 1963 (J.A. 41).

(2) Petitioners state "at least three key contract subjects were excluded from the Association's bargaining power" (Pet. Br. 53). The Association agreement provided that only certain matters could be excluded from Association bargaining and those could be excluded only with union agreement (RX-206, par. (3)(a)(b)). The Board found "both Unions agreed to the exclusions during the course of bargaining" (S.A. 4a; J.A. 75-76).

(3) Petitioners claim that "U.S. Plywood throughout the pre-lockout negotiations insisted on continuing individual bargaining over hours of work and overtime" (Pet. Br. 53). On the contrary, the record shows, as the Trial Examiner found (J.A. 78-80), that U.S. Plywood agreed that Association bargaining would govern and, in addition, offered to bring all questions relating to hours of labor into the Association bargaining (J.A. 174, 189-190; RX-398). Further, as the Trial Examiner found, the problem of handling U.S. Plywood's local openings related to the mechanics of bargaining and not to the authority of the Association to bind its members (J.A. 78).

(4) Petitioners say that "each of the individual-employer invitations to the unions to commence bargaining asked them to negotiate with the Association 'and this Company'" (Pet. Br. 53). Each of such letter stated "this Company hereby delegates to the Association authority to bargain collectively" on all issues other than certain limited exceptions which were to be bargained separately with each Company (J.A. 22-23). The letters refer to meeting with the Company as well as with the Association because local plant and other special issues were to be bargained between the Union and each Company separate from the Association bargaining.

(5) Petitioners say that "at every bargaining session each of the six employers' individual negotiators participated. J.A. 404-405" (Pet. Br. 53-54). Petitioners'

record citation shows only that company representatives were present at the negotiations as Association committee members and various members spoke when they were caucusing "among ourselves deciding on what we should do next" (J.A. 404). The uncontested evidence is that at each negotiating session Wyatt, chairman of the Association negotiating committee, acted as sole spokesman for the Association and all employer proposals were made by Wyatt "on behalf of the Association, as an association, representing all its members" (J.A. 617, 660).

(6) Petitioners say the Association's 75 percent voting provision "was conceded to have been a veto for any single employer" (Pet. Br. 54). It was not so conceded and it is not a fact. The Association agreement provided for "a favorable vote of 75% of the association membership" for a decision pertaining to negotiations (RX-206, par. (5)). In an unemployment insurance hearing, Association witness Wyatt gave some confused testimony on the application of the 75 percent rule to six-member bargaining and to five-member bargaining. He finally said at that hearing "... I am sorry, of course, it requires two [negative votes] in either case to defeat an action" (GCX-42, 92).¹⁰ Mathematically, if there were six votes to count, five affirmative votes are more than 75 percent of six and would control over a single negative vote. Similarly, if there were five votes to count, four affirmative votes are more than 75 percent of five and would control over a

¹⁰ In the hearing before the Trial Examiner, Wyatt testified in reference to the quoted testimony in the unemployment insurance proceeding:

"... to the extent that that testimony says that I believed at that time or at any time that one company by itself in either the Lumber and Sawmill negotiations or the IWA negotiations could abrogate the agreement by its sole vote then I either mispoke myself or had something else entirely in mind" (J.A. 439).

"The facts are and were that no one member could abrogate any action by the Association" (J.A. 441).

single negative vote.¹¹ Thus, no single negative vote could defeat or "veto" action by the Association. The Board properly found that "it is quite clear that at least two negative votes were required" to defeat a proposal among Association members (S.A. 4a). The record in fact shows that Weyerhaeuser was twice out-voted by the other Association members, 5 to 1, on critical issues and was bound by the group decision (J.A. 274, 282-283).

(7) Petitioners' last point is their assertion that the final version of the Association agreement did not include the words "binding on all companies" (Pet. Br. 54). Petitioners fail to point out that the Agreement states the same thing in other words. The Agreement provided that "the Companies agree to submit to association bargaining . . . all matters pertaining to wages, hours and other conditions of employment . . ." (with certain exceptions upon union agreement) (RX-206, par. (3)), and provided that when negotiations "result in an agreement . . . all of the collective bargaining agreements between the several association members and the affected local unions shall be amended and supplemented accordingly" (RX-206, par. (6)).

We submit that the record shows that none of the Unions' points has any substance and that the facts are as stated in the findings of the Trial Examiner and the Board. The substantial evidence in the record fully supports the

¹¹ In footnote 27 of Petitioners' Brief (p. 54), counsel says that although Wyatt testified that Rayonier, which had no contracts with LSW, would be excluded in computing the 75 percent vote requirement in LSW negotiations, "the fact is that Rayonier did actually participate in at least one vote involving contract offers to LSW . . . (R. 368 [GCX-76] p. 16)." Petitioners are in error. The exhibit, handwritten notes of an employer caucus during LSW bargaining, states that all Rayonier did was express its "unofficial position." The exhibit confirms Wyatt's testimony that in LSW negotiations, only the five votes of the bargaining members were counted. As the Trial Examiner found, the Rayonier representative did not serve on the Association committee which negotiated with LSW (J.A. 41, n. 24).

Board's conclusion: "We find unpersuasive the various factors relied upon by the Charging Parties . . . in an attempt to demonstrate that the Employers were not committed to be bound by the action of the Association in bargaining" (S.A. 3a).

B. The Unions Were Advised of the Intent to Establish a Multiemployer Unit and Accepted Bargaining on That Basis

Petitioners next argue that the unions did not agree to a multiemployer bargaining unit (Pet. Br. 56). The argument here again ignores the detailed findings of the Trial Examiner and the Board and is developed out of an assortment of half truths and unsupported generalizations. Basic to petitioners' argument is the contention that:

"... Wyatt's representations . . . were characterized by the desire to reveal as little as possible of any intention to achieve a multiemployer unit" (Pet. Br. 57);

"... the Board can point to no single instance where the companies ever expressly referred to the creation of a multiemployer unit as such . . ." (Pet. Br. 60); and

"... no such bargaining unit was in terms mentioned as proffered to the unions" (Pet. Br. 61).

But the record is to the contrary.

There can be no question that the employers' purpose was to establish a multiemployer unit and to obtain union consent to bargain on that basis. Wyatt testified on cross-examination that "It was my opinion that we were authoritatively capable of bargaining as a *multi-employer unit*" (J.A. 373). Wyatt told Nelson of IWA as early as February 18, that the proposed association would be "one that would be a *multi-employer unit* as I knew it in which the individual members thereof would be bound to agree to a common agreement or a common disagreement"

(J.A. 128). Similarly, on the following day Wyatt talked to Hartley of LSW about "the desirability of the formation of a fully-bound *multi-employer unit* in the lumber industry" (J.A. 130). On April 12, Wyatt called Hartley and told him "that an association had been formed and we proposed to bargain with this union as a *multiemployer unit*" (J.A. 160). Hartley said, after further discussion, "Well, fine, let's set up some meeting dates" (J.A. 161). And on May 9, the opening day of the LSW negotiations, according to LSW negotiator Johnston, the companies "outlined what they had in mind. First they wanted the stability of a *unit* contract covering the area of their association" (J.A. 585).¹²

The head of IWA, Nelson admitted "that from the time [IWA] began negotiating on April 24 with the Association [he] knew that [they] were negotiating on a different basis with the Association" than with prior more loosely organized employer bargaining groups (J.A. 531-532). The significant difference, Nelson testified, was that the Association's committee "could finalize an agreement reached on those matters which they had been given the authority

¹² Petitioners purport to find in statements by one of intervenors' counsel, Mr. Prael, in the oral argument on the prior review by the Court in Proceeding No. 19,842, a "judicial admission" that the employers did not intend to create a multiemployer unit when they established the Association (Pet. Br. 68-70).

This is certainly not what was said, and counsel's remarks cannot be fairly so interpreted. The point made by Mr. Prael was that neither present counsel or the lawyers who drafted the association agreement "read *Buffalo Linen* as narrowly" or considered a multiemployer unit to be "the essential basis" of a valid defensive lockout under the Act. The record clearly shows, however, that, whether or not the drafters thought a multiemployer unit essential, the employers' purpose was to establish such a unit and they thought they had established one (J.A. 128, 130, 160, 373; RX-100, RX-176, RX-177, RX-210, RX-211). The Trial Examiner and the Board have so found, and there is ample evidence to support the finding (J.A. 4, 51, 54, 67, 69, 76; S.A. 2a-4a).

If argument of counsel is to rise to the level of a "judicial admission", we call attention to the statement by Mr. Rauh in the argument before the Court on the prior review in which he said: "I concede the case right now if the Board finds it's a multiemployer unit . . ." (Appendix B).

to negotiate on by their 'Association' members" (RX-396, 12; J.A. 531-532, 545).

LSW's Johnston likewise admitted that LSW was told by the Association at the first bargaining meeting "that the association was agreeing to bind all of its member companies to any settlement reached" (J.A. 582, 617; J.A. 41-42). Johnston further admitted that throughout the negotiations Wyatt "was speaking for the Association, as an association" and that all employer proposals were made "on behalf of the Association, as an association, representing all its members" (J.A. 617; GCX-42, 76).

After fully explaining the employers' delegation of bargaining authority to the Association and their binding commitment to the result of the Association bargaining, Wyatt told IWA "*that the Association recognized that it is subject to Union agreement to bargain on this basis*" (GCX-54, 1), and he told LSW that "*they were free to break off the Association level bargaining*" if the unit proposal was not satisfactory to the Union (J.A. 372). Both unions proceeded to bargain on the basis proposed by the Association. Indeed, LSW's Johnston expressly stated, "*We will agree to recognize you as an association for collective bargaining on wages and not only on your issues, but also our issues that we have or will present to you*" (RX-400, 5).

The Unions not only dealt with the *employers* as a group; their demands upon the Association and their proposals show that they treated the *employees* represented in the bargaining as a single group for purposes of bargaining; i.e., a single unit. Union demands were in each case to apply to similarly situated employees throughout the group without regard to which company might be the employer of particular employees. More particularly, both IWA and LSW made demands for establishment of a joint Association-Union committee to study and make recommendations on automation and job classification problems on a single unit-wide basis (GCX-55, 3; RX-400, 6). Agreement on

this proposal was reached *prior* to the strike and lockout (GCX-61, 5; GCX-55, 45; GCX-56, 2), and was included in the Association settlement agreement (RX-222, 4). Further, IWA demanded that "bracket" wage adjustments be made on the basis of guidelines to be established by an IWA-Association committee for all covered employees (GCX-54, 2, 7).

In accordance with the evidence, the Trial Examiner found:

- (1) That throughout the bargaining, "To the extent that contract subjects were open and did not concern the excluded subjects, the Association was bargaining for, and ultimately reached, a settlement uniform as to all members" (J.A. 69).
- (2) That throughout the bargaining, IWA's "proposals were made to the Association as such and it dealt with the Association's offers as joint offers" and that it "continued to meet with the Association's representatives with no intimation that it was not recognizing the Association as a multi-employer agent for group bargaining" (J.A. 86).
- (3) That on July 9, 1963, IWA's Nelson "expressed approval of the Association as a method of bargaining" and that IWA had "given the Association every reason to believe that it was bargaining for a joint settlement" (J.A. 87).
- (4) That "LSW knew that the Association had been formed to bargain jointly, and it never pretended to believe, before July 1, 1963, that the Association was a bargaining representative for any company separately from the other members. The Association had never been designed to bargain as agent for individual employers, and LSW had no reason to believe that it had been" (J.A. 91).

In view of the foregoing, the claim of the petitioners that by participating voluntarily in joint bargaining which

ensued they assented to no more than "an ambiguous association of convenience" (Pet. Br. 61) is incredible. The record amply shows, as the Board found, that "both Unions . . . accepted the new multiemployer unit by their participation in the negotiations" (S.A. 5a).

Petitioners' next contention has to do with the fact that the LSW negotiator asked at one point if LSW could have a copy of the Association agreement and it was not furnished (Pet. Br. 62).¹⁸ During that bargaining session, LSW was advised that the employers were members of the Association and had delegated authority to the Association to bargain (GCX-59, 1), that all members were bound by the negotiations (J.A. 582, 617), that that agreement was in writing (J.A. 579), that the agreement contained a provision that a strike arising out of Association bargaining would be treated as a strike against all members involved in the negotiations (J.A. 41, 302; GCX-59, 1; RX-400, 1), that the bargaining would apply to all plants in the territorial area "west of the Cascades" (J.A. 42, 296-207; GCX-59, 1), and that the bargaining would cover all issues open for negotiations except certain local and special issues which by custom and agreement with the Unions were to be handled at the local plant level (J.A. 42, 582; GCX-59, 1). The Trial Examiner found "that Wyatt truthfully answered the direct questions put to him by Johnston [the LSW negotiator] concerning the nature of the Association and specifically the one about whether the Association's agreement contained a provision giving it the right to look upon a strike against one as a strike against all" (J.A. 71). Thus, LSW was fully informed of

¹⁸ As the Trial Examiner found, IWA commenced negotiations "with the Association by showing no concern for the size or shape of the bargaining unit and showing no special concern over the terms of the Association's enabling agreement" (J.A. 85). The record shows that IWA at no time asked to see a copy of the Association agreement (J.A. 438).

all terms *inter se* upon which the employers proposed to bargain and in which LSW indicated any concern.¹⁴

The single complaint now made is that LSW was not informed as to the Association's internal membership voting procedure. The Trial Examiner answered this complaint by saying: "If a labor organization is actually concerned about the number of votes required by an association to carry a decision, it has only to ask. The LSW did not do so" (J.A. 72). LSW merely asked on one occasion to see a copy of the Association agreement, not indicating that there was any specific purpose in mind. When Wyatt reportedly laughed at the proposition, he did not indicate any finality in his failure to respond, and the request was never renewed. This cannot be construed as a refusal to disclose the voting procedure, particularly in view of Wyatt's willingness to freely answer questions as to other internal policies and procedures.

Moreover, Johnston, the negotiator for LSW was apparently under the impression during the bargaining that Association action had to be by unanimous consent. He testified as to what on May 9, "we understood of Mr. Wyatt's discussion" and said, "I pointed out [to the Association] in our opinion any one company that we hold a contract with could then veto any action of the association" (J.A. 578). This apparently did not in any way

¹⁴ At the oral argument on the prior review by this Court the Court asked intervenors' counsel if there was "any significance . . . to employers refusing to show the agreement between themselves to the union" (S.A. 17a). Intervenors' counsel replied that he did not "think there's any significance." In further explanation he referred by analogy to an employer request to see the union constitution and by-laws and to "see who's paying for all this." This he told the Court was "none of [the employer's] business," and, similarly, provisions in the Association agreement "how expenses would be paid and all that sort of thing" was "none of the union's business" (S.A. 18a). Intervenors' counsel had in mind the Board holding, in the converse situation, that "an employer is not privileged to probe into the internal arrangements of a union" (*The Prudential Insurance Company of America* (1959), 124 NLRB 1390, 1397; and see *North County Motors, Ltd.* (1964), 146 NLRB 671, 674).

deter LSW from stating unequivocally later that same day, "We will agree to recognize you as an association for collective bargaining . . ." (RS-400, 5). Having acted on the assumption that the Association would act only with the unanimous consent of its members, the claim that LSW would not have negotiated if it had known that more than a majority vote of the members (i.e., 75 percent) was required in making bargaining decisions is without substance.

Regarding the 75 percent voting provision the Board said "That provision was reasonably explained by Weyerhaeuser's size vis-a-vis that of its fellow members and the fact that each Company had only one vote, regardless of size" (S.A. 4a; and see J.A. 291). In practice a voting requirement of substantially more than 51 percent is not unique.¹⁵ For an association to function under threat of whipsaw strikes and other economic action, there must not only be substantial majority support for, but minimal dissent from, the group position on issues which may have critical and possibly disastrous effect on the businesses represented by the participants (see Bahrs, *The San Francisco Employers' Council* (1948), 24).¹⁶

As long as the employers' representative, the Association, had the requisite authority to speak and did speak for the members in the negotiations and could bind them, the organization voting procedure, i.e., whether the Association's proposals and commitments accorded with the views of 75 percent or 51 percent of the members, was not critical

¹⁵ See, e.g., "Memorandum of Agreement," dated August 31, 1965, between five major air carriers, providing for joint negotiations with IAM, and providing for "an affirmative vote of at least a majority plus one of the participating carriers" (4 out of 5) in deciding the 'carriers' position on the handling of the economic subjects listed in the IAM-Carrier agreement for joint bargaining." Approved by the Civil Aeronautics Board, Oct. 29, 1965 (BNA Daily Labor Report (Nov. 2, 1965) No. 212, p. E-3).

¹⁶ This study on multiemployer bargaining was cited by the United States Supreme Court in *Buffalo Linen*, *supra*, 353 U.S. at 95, n. 23.

to the bargaining and, in fact, in this case did not in any way impede or affect the bargaining.

The findings of the Trial Examiner and subsequently by the Board that the employers "effectively established a multi-employer unit" and that "both Unions accepted that unit" are fully supported by substantial evidence and petitioners have failed to show any justification for overturning those findings.

On June 5, 1963, the two unions started whipsaw action to break the Association bargaining position by striking plants of two of the six companies in the bargaining unit. In announcing the shutdown by the four respondent companies in defense against the union attack, the Association said:

"Union tactics offer the association no alternative. If employers did not maintain a position of joint strength in the face of selective strikes, the union action against the two companies would destroy the integrity of the association bargaining unit. This would immediately end hopes for long-run labor relations peace and stability" (RX-210).

We submit that on this record and the facts as found, the Board properly concluded that the lockout by intervenors was lawful under *Buffalo Linen*.

II.

THE BOARD PROPERLY FOUND THE LOCKOUT LAWFUL UNDER AMERICAN SHIP BECAUSE THE LOCKOUT BY EACH OF THE RESPONDENT EMPLOYERS WAS IN SUPPORT OF ITS BARGAINING POSITION HELD IN COMMON WITH OTHER EMPLOYERS IN JOINT BARGAINING

As a second and independent ground for the dismissal of the complaint against intervenors, the Board, after reconsideration on remand, reaffirmed its original holding that, assuming *arguendo*, a formal multiemployer unit had not been formed and accepted, the lockout was nevertheless lawful under the principles stated in *American Ship Build-*

ing Co. v. Labor Board (1965) 380 U.S. 300, and *Labor Board v. Brown* (1965) 380 U.S. 278 (S.A. 2a). In accordance with the court's instructions on remand, the Board has clarified its findings with respect to the nature and type of bargaining and explicated its rationale on the right to lock out in the particular bargaining context presented in the case.

The Board holding on this point is predicated upon its findings (1) that the employers with union agreement bargained jointly to a common settlement (a fact conceded throughout the proceeding by both unions but now ignored by their counsel), (2) that each, as well as all, of the employers in such bargaining reached an impasse on economic items with both unions, (3) that faced with this impasse both unions instituted a whipsaw strike against two members of the Association for the express purpose of obtaining a favorable industry-wide settlement from all six member companies, and (4) that the lockout which followed union whipsaw action "was intended to, and did, support the individual (and common) position of each of the employers engaging in the lockout" (S.A. 11a).

Thus, in its Supplemental Decision and Order, the Board found:

(1) *Joint Bargaining.*

"All six members of the Association advanced a common bargaining position through a single designated representative, a fact recognized by the Unions. The Unions in turn made common demands through the Association, which we here treat as their (the Employers) joint agent, upon all six Employers. Further, as noted above, each of the six Employers had committed itself from the outset of bargaining to be fully bound by any agreement reached on its behalf by the Association, and each of the Unions was so advised at the commencement of the respective negotiations . . . And, in our opinion, the factors enumerated above are

ample to justify labeling as 'joint' the bargaining conducted herein" (S.A. 10a).¹⁷

(2) *Impasse.* The Board found that before the strike and lockout "all six Employers had reached an impasse with the Unions over certain of the economic items being negotiated." It stated that "'The record is replete with evidence supporting this finding'" and referred to specific evidence in the record including express admissions by the spokesmen for both Unions (S.A. 8a-9a, 11a).¹⁸

(3) *Union strike tactics.* The Board further found that "the Unions initiated the economic combat by engaging in what they termed selective strikes against some members of the Association in order to obtain an 'industry-wide settlement' from all six Employers" (S.A. 11a, n. 20).

(4) *Lockout to protect each employer's own interest.* In this context, the Board found that "the determination of the six Employers to bargain together for common terms, and the attempt of the Unions to secure common terms from all of the Employers in the negotiations with the Association and by means of their selective strike against two of the six, clearly reveal in the circumstances of this case that each of the Respondents had a legitimate business interest of its own to protect when it acted to support 'the interests of the group', i.e., the common bargaining position they had taken in their joint dealings with

¹⁷ The Trial Examiner found that IWA did not at any time indicate a desire "to bargain other than with the Association as an employer group" (J.A. 87) and that LSW met with the Association knowing it "could only bargain [for its members] as a group" (J.A. 91). The fact of joint bargaining was confirmed by both employer and union witnesses and the details of the joint bargaining are recounted at length in the Trial Examiner's Decision (J.A. 27-67).

¹⁸ Intervenors specifically pleaded an "impasse" in negotiations with each union in their answer to the complaint (Resp. Ans. pp. 4, 7). And, as the Trial Examiner found, the evidence showed that the elders of both unions conceded an "impasse" in breaking off negotiations and starting their whipeaw strike (J.A. 39, 53).

the Unions" (S.A. 10a-11a, n. 19). In the words of *American Ship*, the Board found that each of the respondent Association members locked out "its employees in order 'to affect the outcome of the particular negotiations in which it was engaged'" (G.S. 11a).

A. When the Unions Attacked the Bargaining Position of Respondent Employers by Whipsaw Strike Action After an Impasse, Such Employers as Primary Parties to the Dispute Were Entitled to Lockout Under American Ship

Petitioners attempt to ignore the foregoing findings of the Board. Instead, they argue on the basis of hypothetical facts and various legal theories that a "neutral" employer cannot lock out in support of a struck competitor. All of petitioners' arguments under sections "A" and "B" of Part I of their brief are but variations on this same theme. Thus the contention under "A" is that the lockout impaired the right to strike and constituted unlawful discrimination because the locking-out employers lacked a primary interest in the dispute (Pet. Br. 24-31).¹⁹ Similarly, the contention under "B" is that a "gross imbalance" would result if the employers here had the right

¹⁹ Petitioners rely primarily on a number of early Board decisions in lockout cases preceding *Buffalo Linen* (Pet. Br. 25-27) which are either inapposite or have no continuing vitality in view of repeated judicial rejection of the rationale relied upon. Indeed, the two cases upon which principal reliance is placed, *Morand Bros. Beverage Co.* (1950), 91 NLRB 409 (quoted extensively at Pet. Br. 26-27) and *Davis Furniture Co.* (1951), 94 NLRB 279, were reversed. In each case, the respective Courts of Appeals rejected the rationale relied upon by petitioners here. (*Morand Bros. Beverage Co. v. NLRB* (7th Cir. 1951), 190 F. 2d 576, 582-583; *Leonard v. NLRB* (*Davis Furniture Co.*) (9th Cir. 1953), 205 F. 2d 355, 357-358; see also *Buffalo Linen*, *supra*, 353 U.S. 87 at 92-93).

Finally, *American Ship*, *supra*, 380 U.S. 300, conclusively put to rest petitioners' contentions when it held that "use of the lockout does not carry with it any necessary implication that the employer acted to discourage union membership or otherwise discriminate against union members as such" and that it "does not appear that the natural tendency of the lockout is severely to discourage union membership while serving no significant employer interest" (380 U.S. at 312).

to use the lockout since, as they incorrectly assert, the Unions were forbidden to strike (Pet. Br. 31-35).

The underlying premise of all these contentions is the demonstrably false assumption that the four non-struck companies were "neutral" employers, that they had no primary interest in the dispute, and that their only interest was that of a secondary employer engaging in a lockout to aid or support a competitor who had been struck. Their contentions just cannot be squared with the following uncontradicted facts established by the record.

After having reached an impasse with the six employers in their joint bargaining, the two Unions "in a co-ordinated move" designed "to gain wage increases industry-wide" (RX-395, RX-378), initiated what the Board termed "union whipsaw action" (S.A. 12a). The Unions' strategy was spelled out by an officer of IWA as follows:

"In order to make the Strike as effective as possible, the Negotiating Committee and Executive Board have elected to Strike certain selected companies at first and then extend it from time to time as circumstances and good strategy dictates. This, we believe will be the most effective method to obtain an industry wide settlement, in the shortest time, with the last sacrifice by the members."

• • • • • • • • • •

We close by pointing out that this is a Strike to bring about an industry wide settlement. The method is only for strategic purposes" (RX-378; See J.A. 542-543)."

The head of LSW told the Association bargaining committee that LSW "was going to take economic action against some but not all of the companies or plants involved" (J.A. 684) and then wrote to all LSW locals stating "negotiations with the Big Six reached an impasse and economic action is the only method left to achieve your wage demands. Consequently, a strike will commence at some plants 12:01 a.m., Wednesday, June 5, 1963" (RX-391).

On the afternoon of June 5, a meeting was held of the Association negotiating committee and other representatives of the member companies (J.A. 227-228). When St. Regis and U.S. Plywood representatives reported strike action at their plants, Wyatt as chairman,

"... inquired as to whether there was any possibility that any of these strikes at any particular location might have been the result of something other than the bargaining we had been participating in between the Association and the Unions. Could there be a grievance strike or something else other than the issues before the Association and the unions" (J.A. 228).

The importance of this inquiry was that the Association agreement provided:

"If a strike should occur against any member company or any of said operations during or as a result of negotiations on a matter [not submitted to Association joint bargaining] the other members of the association shall *not* be deemed affected *nor* be required to close or suspend any operations by reason of such strike" (RX-206, par. (7)).

The requirements for a lockout under the Association agreement are also clearly set forth in paragraph (7) which specifies when there will be a shutdown, which member companies shall shut down and why they shall shut down. Thus the agreement provides for a lockout (a) only when a union strikes "as a result of negotiations on or with respect to subjects of bargaining delegated to the association"; (b) in the event of such strike the other member companies "committed to such negotiations" shall lock out; and (c) such members shall lock out "in order to protect the entire membership of the association in its conduct of such bargaining negotiations." (RX-206, par. (7)).

In accordance with the foregoing provisions of their agreement the Association members proceeded in their meeting to consider the nature of the strike against two of its members. It was determined that the "strike had

occurred over subjects delegated" to the Association, and it was unanimously agreed that the nonstruck companies would close down their operations (J.A. 230). The Association then issued an announcement which reviewed the entire history of the negotiations. The announcement went on to state:

"Both unions rejected the Association's final offer. They chose to commence strike action against two of the member companies. The Lumber and Sawmill Workers and International Woodworkers union leaders have indicated that they are cooperating in carrying on this strike. They have also indicated that other companies in the association may be struck in turn if there is no settlement of the contract dispute. It seems clear from the strike action taken against two members of the group, and from other actions of the unions, that the unions intend to force acceptance of their demands, using whipsaw tactics selectively against each company. . . ."

"In the face of these selective strikes and whipsawing tactics, the other members of the association have been forced to the decision that they must close their operations, where members of these unions are employed." (RX-210)

The foregoing amply demonstrates that the lockout was *not* an automatic response dictated by a prior agreement to come to the aid of a competitor. Far from implying that the lockout was the sympathetic act of a neutral to aid a competitor, the agreement negates any such sympathetic motivation.²⁰ As the Board found:

"Moreover, the lockout provisions of the agreement were by their express terms operative only 'with re-

²⁰ Petitioners misrepresent respondents' position before the Board on this point when they purport to quote from respondents' brief to the Board an alleged "confession" that if the employers "had 'been under no obligation to lockout under the Association agreement . . . it is unlikely that all or, in fact, any of the respondent companies would have locked out in mere sympathy for their competitors'" (Pet. Br. 3). This, petitioners claim, was a "candid confession by the employers, that there would have been no concerted lockout absent the solidarity-lockout compact among them" (ibid).

spect to subjects of bargaining delegated to the Association.' Contrary to the assertions of the Charging Parties, the lockout provision of that agreement cannot be viewed in isolation from the provisions delegating to the Association the authority to represent its members in presenting to the Unions a bargaining position common to all, as discussed more fully below" (S.A. 8a).

The uncontradicted facts further demonstrate that what the Unions now try to characterize as a "strike against competitors" was a strike against the Association and all its members designed to force concessions out of the Association applicable to all its members. Likewise, what petitioners describe as "a secondary lockout to support a struck competitor" (Pet. Br. 28) is clearly established as a defensive lockout to protect the bargaining position of each of the employees who locked out which was threatened by the Unions' whipsaw strike.²¹

The gross distortion created by petitioners' ellipsis is apparent from a reading of the full quote:

"The court suggests that it is not a uniformly unhappy condition 'to be able to keep on doing business while a competitor is shut down' (Ct. Dec. p. 4). This would be true if the strike of June 5, 1963, had been directed solely at U. S. Plywood and St. Regis to enforce union demands made on those two companies alone. In that situation the four respondent companies would have been under no obligation to lockout under the Association agreement (R-207, par. 7) and as the court infers, it is unlikely at all or, in fact, any of the respondent companies would have locked out in mere sympathy for their competitors" (Resp. Br. on Remand, p. 23).

The plain meaning of this statement is that with the agreement they had, the four respondent companies would not have locked out had not their own bargaining interests been directly involved.

²¹ In marked contrast to the facts here was the situation in *NLRB v. David Friedland Painting Co.* (3rd Cir. 1967), 377 F. 2d 983, cited by petitioners (Pet. Br. 28, n. 7). The Court there stated:

"But the Elizabeth Association [of which Friedland was a member] was not involved in any negotiations with [the striking] Local 144, the strike was not against that association or Friedland; nor were any demands being made upon them by Local 144. Clearly, Friedland had no legitimate bargaining position to protect" (377 F. 2d at 988).

The Board pointed out that:

"While that action [the lockout] had the conceded effect of supporting the bargaining position of the other Association members, the record herein compels a finding that that action was intended to, and did, support the individual (and common) position of each of the Employers engaging in the lockout" (S.A. 11a).

Thus, the respondent companies were clearly primary employers in this dispute. These companies were not considered "neutrals" by IWA when, in announcing its whip-saw strategy to obtain an Association settlement, IWA said the Union has "elected to Strike certain selected Companies at first and then extend it from time to time as circumstances and good strategy dictates" and that this was "the most effective method to obtain an industry wide settlement" from the Association (RX-378). Nor were these companies deemed "neutrals" by the head of LSW when he told the Association members at the bargaining table on the eve of the strike that LSW "was going to take economic action against some but not all of the companies or plants involved" (J.A. 684).

The Unions claimed a protected right to strike some or all of the plants covered by the joint bargaining and "extend" the strike to the other employers and plants when and as their strategy dictated. The question whether national labor policy, as petitioners now argue, is against "extension of a primary labor dispute to neutral employers and their workers" (Pet. Br. 31) misses the mark. In the case at bar, both Unions' words and conduct clearly demonstrated that they considered each and all of the six employer members of the Association to be primary parties to the dispute, as indeed they were.

Petitioners argue that a "gross imbalance" results from permitting the employers to lock out where (as petitioners assert) the Unions are forbidden to strike. This argu-

ment perpetuates the same false premise that the locking out employers were "neutrals" in the disputes and that the Unions were prohibited by Section 8(b)(4) from striking these employers. There can be no doubt that the Unions could have lawfully struck any or all of the Association members and, indeed, asserted their right to do so. Such a strike would have been primary and lawful, not secondary and unlawful in character. In a situation where a union has reached a bargaining impasse with several employers engaged in joint bargaining, there is, as the Board found, a bargaining impasse with each of them, and the union is free to strike. There is no "neutral" employer and the right to strike is unrestricted. Consequently, the claimed "imbalance" does not exist. As the Board implicitly recognized in its decision, the right to use a bargaining lockout, like the right to strike to influence bargaining, is at least coextensive with the scope of the actual bargaining format adopted by the parties.

Indeed, imbalance would arise if the nonstruck employers were forbidden to lock out in a situation where the Unions instituted a coordinated whipsaw strike to obtain a favorable Association-wide settlement of their economic demands made upon all six employers, jointly and equally. To deny such beleaguered employers the right to defensive self-help measures to protect their bargaining position would create a genuine disparity of rights and privileges totally inconsistent with the function of the statute and, especially, with the doctrine of *American Ship* (see, e.g., S.A. 11a, n. 20).

In view of the Unions' economic demands for an "industry wide settlement" and the Unions' admitted whipsaw strategy to enforce those demands upon all Association members, petitioners' description of the respondent companies as "neutral" employers who were "secure . . . from involvement in a labor dispute with another employer" (Pet. Br. 35) is pure fantasy.

B. Petitioners' Antitrust Argument Ignores the Approval of Multiemployer Bargaining by Congress and the Courts and the Right To Take Economic Action To Affect Settlement Within the Scope of the Bargaining Format

Petitioners have also attempted to inject extraneous antitrust theories into this section 8(a)(3) and (1) litigation. Their elaborate theoretical constructs in antitrust doctrine are not germane to the governing issues in this case²² and are, moreover, premised on a fundamental misconception of national policy with respect to the antitrust laws and the regulation of union-management relations.

The basic national policy with respect to the application of antitrust norms to labor-management disputes has been settled at least since *Apex Hosiery Co. v. Leader* (1940) 310 U.S. 479, in which the Supreme Court stated that

"... consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. ... But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act. [citing cases]" (310 U.S. at 503-504).

In the footnote appended to the foregoing the Court further explicated the governing policy:

"Federal legislation aimed at . . . eliminating the competition of employers and employees based on labor

²² This Court's order of remand clearly identified the issues to be considered but, significantly, did not include petitioners' antitrust contentions which were also raised on the initial appeal seeking a remand. The irrelevance of petitioners' antitrust contentions to the validity under sections 8(a)(3) and (1) of a multiemployer lockout is further demonstrated by the Supreme Court's remand order in the *Evening News* case. There, the Board requested remand in order to reconsider the case in the light of both *Pennington and American Ship*; the Supreme Court pointedly limited its remand to a reconsideration "in light of *American Ship Building Co. v. Labor Board*, 380 U.S. 300" (*Newspaper Drivers & Handlers Local Union No. 372 v. Detroit Newspaper Publishers Association, et al. (Evening News Ass'n.)* (1966), 382 U.S. 374).

conditions regarded as substandard, through the establishment of industry-wide standards both by collective bargaining and by legislation setting up minimum wage and hour standards, supports the conclusion that Congress does not regard the effects upon competition from such combinations and standards as against public policy or condemned by the Sherman Act" (310 U.S. at 504, n. 24).

That this policy continues to be the law today was made clear by the decision of the Second Circuit in *Kennedy v. Long Island Rail Road Company* (2d Cir. 1963) 319 F.2d 366. There the court held that mutual assistance between employers embroiled in a labor dispute through participation in a strike insurance plan was not in violation of either the labor or the antitrust laws. With respect to the asserted violation of the antitrust laws, the court held:

"These assertions must also fail, for the fundamental reason that the named statutes were designed principally to outlaw restraints upon commercial competition in the marketing and pricing of goods and services and were not intended as instruments for the regulation of labor-management relations" (319 F.2d at 372-373).²³

The cases cited by petitioners in support of their antitrust contention are plainly inapposite. The group boycott cases, such as *Klor's v. Broadway-Hale Stores* (1950) 359 U.S. 207, treat with commercial boycotts or refusals by traders to deal with other traders, and have no relevance to this case. Likewise, the *Anderson v. Shipowners Assn.* (1926) 272 U.S. 359, line of cases (Pet. Br. 43-44) involves "blacklisting". The restrictive employment rules in such cases were imposed by the employer group to fetter the freedom of individuals to move from one employer to another with the apparent employer objective of controlling

²³ One of the stated purposes of the National Labor Relations Act is the "stabilization of competitive wage rates and working conditions within and between industries" (29 U.S.C. 151).

employment so as to prevent employee organization and collective bargaining. There is no analogy to an employer organization established for the legitimate purpose of engaging in collective bargaining with the employees' designated representative. Moreover, none of these cases involved the use of economic sanctions by parties to a labor dispute; such sanctions are part and parcel of the national labor policy relating to collective bargaining (*American Ship Bldg. v. Labor Board* (1965) 380 U.S. 300, 317).

Finally, the *Allen Bradley Co. v. Union* (1945) 325 U.S. 797 line of cases, on which *United Mine Workers v. Pennington* (1965) 381 U.S. 657 is the latest word, involves situations where the employer organization is shown to have combined with a labor organization and entered into illegal agreements to exclude or eliminate competitors and implement their predatory purpose.

Pennington itself stands for the proposition that one group of employers cannot lawfully conspire among themselves with a union to establish a level of wages and benefits which they know their competitors cannot meet, and then agree with the union that the union will impose those conditions on competitors who are *outside* the multiemployer group engaged in the bargaining. Here, there is no evidence of any intent to impose the Association settlement on any employers not directly participating in the negotiations as part of the bargaining group.

Petitioners' contention that an employer *lockout* in a labor dispute is equivalent to a *commercial boycott* is little more than a play on words. The lockout, no less than the strike, when used to further or protect the integrity of the multiemployer group or to counter a whipsaw strike, is not a commercial boycott but a court-approved weapon in a labor dispute. To label the lockout or strike as a boycott is designed only to obfuscate the issue.

The petitioners' argument comes down to the proposition that the use of primary economic weapons between the

parties enmeshed in an economic labor dispute is a restraint of trade under the antitrust laws. This was precisely the erroneous premise on which the court acted in 1927 in *Bedford Co. v. Stone Cutters Assn.* (1927) 274 U.S. 37 and in 1921 in *Duplex Co. v. Deering* (1921) 254 U.S. 443, when it applied the antitrust sanction to both primary and secondary union activity. This primitive view of the antitrust laws has been obliterated by the synthesis which has taken place over the years in the judicial and legislative accommodation of the antitrust policy to a more enlightened and modern labor policy, which sanctions collective bargaining, multiemployer bargaining, and the freedom of both labor and employers to invoke economic weapons in the conduct of labor disputes.

There can be no dispute that the lockout was used here as a weapon in a labor dispute in order to affect the outcome of the negotiations in which the employers were jointly engaged and for no other purpose. In interpreting the National Labor Relations Act, the Supreme Court has made it clear that the parties to a labor dispute are to be accorded wide freedom of action to invoke economic weapons to further their negotiating goals. In the case of *Labor Board v. Insurance Agents* (1960) 361 U.S. 477, the court upheld certain harassing tactics by a union which were intended to put pressure on the employer during the course of negotiations. The court upheld the use of economic weapons as "part and parcel" of the system of collective bargaining established by our labor laws. The right of a union to strike one or all of the employers engaged in bargaining is, of course, unrestricted in a primary dispute. Likewise, in *Buffalo Linen, American Ship and Brown*, the court sanctioned the use of the lockout as an economic weapon available to employers in a labor dispute, and reaffirmed the proposition that the labor law gives both parties to a labor dispute a freedom to "resort to economic weapons should more peaceful measures not avail" *American Ship*, supra, 380 U.S. at 317).

Petitioners go so far in their antitrust contentions as to assert that the establishment of an employer organization for joint or multiemployer bargaining is a per se violation of the antitrust laws. As pointed out by the Supreme Court in *Buffalo Linen*, *supra*, 353 U.S. 87, multiemployer bargaining has long been commonplace and traditional in many important industries, and has been a "vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining" (353 U.S. at 95). Multiemployer bargaining has, as the Court also noted, enjoyed the approval of Congress. The Court concluded that Congress not only "intended that 'the Board should continue its established administrative practice of certifying multi-employer units,'" but also intended to "'leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future'" (*id.* at 96).

There are literally thousands of multiemployer bargaining arrangements functioning on a national, regional or local basis throughout the nation, and the agreements negotiated through the multiemployer or joint employer associations or groups cover hundreds of thousands, even millions, of employees (see *Buffalo Linen*, *supra*, 353 U.S. 87 at 95; Reynolds, *Labor Economics and Labor Relations* (3d Ed. 1959, p. 170)). The format of these numerous employer groups covers a broad range of organizations from the most informal grouping where each employer retains full individual freedom of action to closely organized groups where each employer participant is fully bound. As this Court said in *Retail Clerks Union, No. 1550 v. N.L.R.B. (The Kroger Co.)* 117 U.S. App. D.C. 336, 330 F.2d 210, 216, these employer organizations involve "group activity" which "can and does range over a wide spectrum of habits, practices, and understandings, explicit and implicit, which makes generalization more hazardous than usual."

Since many of these multiemployer bargaining groups have their roots in the distant past, or have been accepted

without controversy, there has been no occasion in the typical multiemployer bargaining situations for the Board or the courts to define their precise legal character or to determine whether they meet all criteria of a technical multiemployer unit. Unquestionably, countless of these group bargaining arrangements are not full-fledged bargaining "units" as that term has been defined under section 9 of the National Labor Relations Act.

It is a common characteristic of all these widespread and wide-ranging multiemployer groupings that they are composed of trade competitors. These multiemployer bargaining groups have been welcomed in many instances by the unions as a means of furthering their own objectives of creating uniform conditions, improving the level of wages and benefits, and, indeed, the elimination of wage competition, which *Apex Hosiery Co.*, *supra*, 310 U.S. 469, teaches is not within the interdiction of the antitrust laws. There can also be no doubt that a common employer purpose of joint or multiemployer bargaining is the establishment through negotiation with unions of uniform wages and conditions within the employer groups, and to provide protection against the threat of whipsaw strikes. The record shows that Wyatt's purposes and objectives were the traditional purposes and objectives of a multiemployer bargaining group. These purposes, as revealed by Wyatt's testimony, were (1) to strengthen the employers' bargaining position; (2) to protect against union whipsawing or "divide and conquer" tactics; and (3) to establish conditions which would improve productivity (J.A. 105-108, 356-357). To be sure, Wyatt hoped that the results of the bargaining would make the product of the employer members more competitive with substitute materials.²⁴ This objective, it may be safely assumed, is shared by every employer and

²⁴ The attempt of petitioners, by the use of quotes lifted from their contest, to ascribe some sinister anticompetitive motive to Wyatt in the formation of the Association cannot be supported by any fair reading of the record testimony (J.A. 105-108, 356-357).

every employer group as it embarks on labor negotiations. But, it is important to note that these hoped-for results were to be achieved through the judicially approved process of collective bargaining. Since wages, hours, and conditions are all mandatory subjects of bargaining under the labor law, it is a contradiction to argue that an employer organization established to negotiate on these subjects is a *per se* violation of the antitrust laws.

Petitioners' antitrust contention that a combination of employer competitors for bargaining purposes is a *per se* violation of the law stands clearly revealed, therefore, as a broadside attack on multiemployer bargaining as violative of the antitrust laws. The unsettling and destructive impact of such a novel doctrine on established labor-management practices in many essential industries is staggering to contemplate, and is squarely contrary to congressional purpose.

After an extensive investigation and study of multiemployer bargaining, the General Subcommittee on Labor of the House Committee on Education and Labor concluded in 1964:

"Collective bargaining between multiemployer associations and unions (representing employees of all of the employers who are members of the particular associations) is now an established practice within labor-management relations. Historically, some of the bargaining relationships between certain multiemployer associations and certain unions in the United States extend as far back as labor-management relations itself" (Multiemployer Association Bargaining and Its Impact on the Collective Bargaining Process, H.R., 88th Congress 2nd Sess., p. 3).

The Committee recognized and approved the basic fact that "The motivations behind the formation of multi-employer associations frequently has been the desire by companies to remove labor costs from the area of competi-

tion" (Id., p. 11). With this fully in mind, the Committee Report concludes:

"The issue for this subcommittee and for the Congress is not whether or how multi-employer association bargaining should be curtailed. We are satisfied that it has made a genuine contribution to free voluntary collective bargaining. Rather the issue is how we can contribute to its strengths and utility so that it can continue to contribute" (Id., p. 32).

The Committee Report discloses a congressional awareness not only of the prevalence and desirability of multi-employer bargaining, but also, specifically of the possible relation of the antitrust laws to such bargaining (Id., p. 28). The congressional silence on the subject since the controlling cases of *Meat Cutters v. Jewell Tea* (1965) 381 U.S. 676, *Pennington*, *American Ship* and *Brown* were decided by the Supreme Court is a clear signal that Congress does not intend to turn the clock back on multi-employer bargaining. The plea by petitioners that this Court make a policy decision against multiemployer bargaining under the antitrust laws is not only without legal foundation; it is obviously addressed to the wrong forum.

III

THERE IS NO CONTENTION THAT THE LOCKOUT WAS MOTIVATED BY ANTIUNION ANIMUS AND THE RECORD SHOWS THAT THE PURPOSE OF THE LOCKOUT WAS WITHIN THE RATIONALE OF BOTH BUFFALO LINEN AND AMERICAN SHIP

The basic weakness of petitioners' entire position is demonstrated by the extent they have been obliged to stray far afield from the *central inquiry* in any case challenging the validity of a bargaining lockout under sections 8(a)(3) and (1)—namely, whether there is independent evidence of discriminatory motivation which established that "the employer was actuated by a desire to discourage membership in the union as distinguished from a desire to affect

the outcome of the particular negotiations in which it was involved" (*American Ship*, *supra*, 380 U.S. at 313).²⁵

In both *Brown* and *American Ship*, the Supreme Court made it explicitly clear that a lockout in the context of collective bargaining negotiations is not inherently destructive of employees' section 7 rights and that any prospect of discouragement of union membership which might exist is comparatively remote (380 U.S. at 282-284, 288-289, 308-310, 312, 313). Where such is the case, the Court held, "actual subjective intent is determinative" and "the Board must find from evidence independent of the mere conduct involved that the conduct was primarily motivated by an antiunion animus" (380 U.S. at 288).

Throughout this entire case, there has never been any contention, nor is there any evidence, that this employer lockout was in any way motivated by antiunion animus. What has been established and found (and is not disputed) is that the respondent employers took lockout action as a defensive response to the declared whipsaw strike tactics of the petitioners with whom they were bargaining on a joint, fully-bound basis. This purpose reflects the provision in paragraph (7) of the Association's organic agreement which provides that when the Unions strike some members of the Association over issues on which bargaining authority has been delegated to the Association, the members "committed to such negotiations" shall lock out "in order to protect the entire membership of the association in its conduct of such bargaining negotiations." (RX-206(7)) This also was the motivation pleaded by respondents in their answer which stated that the employers locked out "for the sole purpose of [a] defending against [LSW's and

²⁵ Similarly, in *Buffalo Linen*, *supra*, 353 U.S. 87, the Supreme Court affirmed the Board's finding that "'in the absence of any independent evidence of antiunion motivation, * * * the Respondent's [sic] action in shutting down their plants until the termination of the strike at Frontier was defensive and privileged in nature, rather than retaliatory and unlawful'" (353 U.S. at 91).

IWA's] whipsaw tactics²⁸ and [b] preserving the multi-employer bargaining basis from the disintegration threatened by [LSW's and IWA's] strike action" (Resp. Ans., pp. 5, 8).

Not only is the employer purpose (which was pleaded, proved, and found) wholly devoid of antiunion motive, it also fits within the motivation rationale of both *American Ship* and *Buffalo Linen*. Thus, the Board has found that lockout was instituted not merely to protect the multi-employer basis of the bargaining (i.e., what the employers believed to be a multiemployer unit), but also to protect and further the joint bargaining position of each and all of the six companies which was being threatened and attacked by the Unions' coordinated whipsaw strike, (i.e., "to affect the outcome of the particular negotiations in which it was involved" (380 U.S. at 313)).

These purposes are not inconsistent with each other but are, in reality, the two sides of the same coin. For as Professor Meltzer observed (prior to *American Ship*), the Supreme Court made clear in *Buffalo Linen*:

"... that the preservation of the [multiemployer] unit was *not an end in itself but a means* of improving the employers' ultimate bargain ... And, as to any particular defensive lockout, it would be a *heroic task* to determine whether its primary significance goes to preserving the unit rather than to exerting economic pressure. Indeed, *those two purposes are so inextricably linked that trying to disentangle them involves an unprofitable word game.*" (Meltzer, "Lockouts: Licit and Illicit" in New York University Sixteenth Annual Conference on Labor (1963) pp. 25-26).

Whether this case is viewed from the standpoint of *Buffalo Linen* or of *American Ship*, the lockout here was without

²⁸ In the preceding allegations of Respondents' Answer these "whipsaw tactics" were alleged to have been "in support of said unions' bargaining demands upon Association for wage increases and other economic benefits" (Resp. Ans., pp. 4, 8).

question undertaken to serve the significant and valid employer interests endorsed by those decisions. Likewise, the essential ingredient of section 8(a)(3) or (1) lockout violations which both those cases require—independent evidence of antiunion motivation—is completely nonexistent. No amount of theoretical rhetoric can obscure this controlling and undisputed fact.

CONCLUSION

For the reasons stated above, we respectfully submit that the petition to review the Board's order should be denied.

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Attorneys for Intervenors

Dated: February 15, 1968

APPENDIX A**Agreement**

It Is HEREBY AGREED by and between the undersigned parties (hereafter referred to as the "Companies"):

WHEREAS, the Companies desire to:

1. Form a multi-employer association through which they will hereafter bargain collectively with labor unions which are duly authorized representatives of employees in the operations of the Companies listed in Exhibit "A", attached hereto and by this reference made a part hereof, and which may be amended from time to time.
2. Mutually assist one another in connection with the procedure, conduct and problems of such collective bargaining, and
3. Promote industrial peace, progress and stability through such collective bargaining.

Now, THEREFORE, it is agreed as follows:

- (1) The Companies hereby join together as a voluntary multi-employer association for the purpose stated above.
- (2) Additional employer companies may become members of this association by (i) making application therefor, (ii) being accepted by the unanimous vote of the members of this association at the time such application is received, and (iii) signing an agreement to be bound in the same manner as all other Companies signatory to this agreement.
- (3) Subject matters which the Companies agree to submit to association bargaining will be all matters pertaining to the wages, hours and other conditions of

employment of the employees hereinabove mentioned, except:

(a) Those matters which are of a local nature that do not have a general impact on the wood products industry if agreed upon by any individual company member of this association as a result of independent bargaining negotiations with any of such unions; and

(b) Those matters which may have such a general impact, but which are specifically reserved from bargaining between this association and said unions by timely notice to and agreement with the unions involved.

(4) Individual company members of this association may reserve to themselves for separate and individual bargaining such matters as are described in (3)(b) above by giving written notice of such reservation to each other member of this association before the association has given notice to the appropriate union of the matters upon which the association will collectively bargain and negotiate with such union.

(5) After written notice is given by the association to the appropriate union as to matters upon which the association is authorized to negotiate, the Companies shall bargain collectively as a multi-employer association and each member company shall participate in such negotiations. Whenever any decision must be reached pertaining to such bargaining negotiations, a favorable vote of 75% of the association membership shall be required. Each member company shall have one vote.

(6) Whenever negotiations between the association and authorized bargaining representatives of local unions pertaining to subjects of bargaining delegated

to the association and to such union representatives, result in an agreement, subject to ratification by the union membership involved, all of the collective bargaining agreements between the several association members and the affected local unions shall be amended and supplemented accordingly.

(7) If as a result of negotiations on or with respect to subjects of bargaining delegated to the association, a strike is instituted by the union involved against any one or more of the association members or against any one or more of the operations listed in Exhibit "A", all other member companies of the association committed to such negotiations shall thereupon close the operations listed in Exhibit "A" in which the striking union is involved, in order to protect the entire membership of the association in its conduct of such bargaining negotiations. If a strike should occur against any member company or any of said operations during or as a result of negotiations on a matter described in (3)(a) or (3)(b) above, the other members of the association shall not be deemed affected nor be required to close or suspend any operations by reason of such strike.

(8) Each member company of the association shall pay the expenses of its own representatives. All other expenses incurred by the association in carrying out this agreement shall be prorated on such basis as the association shall determine from time to time.

(9) Any of the Companies signatory hereto may withdraw from the association formed hereby and terminate its membership therein by giving written notice by registered mail to all other member com-

panies and to the appropriate union(s) prior to March 1 of any year.

Dated this 22nd day of April, 1963.

CROWN ZELLERBACH CORPORATION

By /s/ O. D. HALLIN 4/22/63
Otis D. Hallin
Vice President

INTERNATIONAL PAPER COMPANY

By /s/ H. G. KELSEY 4/15/63
Harry Kelsey
General Manager
Western Operations
Long-Bell Division

RAYONIER, INCORPORATED

By /s/ L. J. FORREST 4/18/63
L. J. Forrest
Vice President

ST. REGIS PAPER COMPANY

By /s/ WM. R. HASELTON
Wm. R. Haselton
Vice President

UNITED STATES PLYWOOD CORPORATION

By /s/ M. R. LEEPER
M. R. Leeper
Vice President

WEYERHAEUSER COMPANY

By /s/ F. WYATT 4/15/63
F. Lowry Wyatt
Vice President

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,842

WESTERN STATES REGIONAL COUNCIL No. 3, ET AL.

v.

NATIONAL LABOR RELATIONS BOARD

The argument of JOSEPH L. RAUH, JR., came on for hearing before the United States Court of Appeals for the District of Columbia Circuit at the United States Courthouse, Fifth Floor, Washington, D. C. 20001.

* * *

THE COURT: What about Brown? That was a multi—

MR. RAUH: Well Brown was a multi-employer bargaining units. I don't think Brown is relevant at all. I conceded this case if it's a multi-employer bargaining unit. It's the fact that the Board couldn't swallow that, and so they put it on this other ground. I concede the case right now if the Board finds it's a multi-employer unit, but I know they're not going to when it goes back because they could have done it in the first time that they had it. They had the chance to do that, but they turned it down.

* * *

UNITED STATES OF AMERICA }
DISTRICT OF COLUMBIA } No. 19,842

I, PAUL R. CUTLER, do hereby certify that the testimony of the witness in the foregoing proceedings was transcribed by me from a magnetic tape recording and that said transcript is a true record of the recorded testimony of the witness to the best of my knowledge and ability.

/s/ PAUL R. CUTLER
Paul R. Cutler

